(2) Supreme Court, U.S.
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No.

**IN THE SUPREME COURT OF THE UNITED STATES**

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BERTRAM RICE, et al., *Petitioners,*

**v.**

STEVEN MARTELL COLLINS, *Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI
# VOLUME I OF I

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# APPENDIX A

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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| STEVEN MARTELL COLLINS,<br>*Petitioner-Appellant*,<br><br>v.<br><br>BERTRAM RICE; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,<br>*Respondents-Appellees.* | No. 01-56958<br>D.C. No.<br>CV-98-09329-TJH<br><br>ORDER AND AMENDED OPINION |

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Chief District Judge, Presiding

Argued and Submitted
June 5, 2003–Pasadena, California

Filed November 7, 2003
Amended April 8, 2004

Before: Cynthia Holcomb Hall, Sidney R. Thomas, and Richard A. Paez, Circuit Judges.

Opinion by Judge Paez;
Dissent by Judge Hall

## SUMMARY

### Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court. The court held that substantial evidence can support a drug offender's contention that the prosecutor dismissed an African American juror because of her race, where the prosecutor's justifications for dismissing the juror on the basis of her age were contrary to the record (likely tolerance of drug offenders), were unrelated to her ability to serve as a juror in the case (lack of community ties), and wee not applied equally to white jurors (single with no children); and where one of the prosecutor's justifications was patently discriminatory (gender), while one of her justifications for dismissing another African American was contrary to the record (age).

Appellant Steven Collins petitioned for a writ of habeas corpus in district court under 28 U.S.C. § 2254, alleging that race motivated the prosecutor's peremptory strikes against two African-American women, Juror 016 and Juror 019, a middle-aged grandmother, during jury selection prior to his California state court trial for possession of a controlled substance. The prosecutor offered five reasons for excluding Juror 016: (1) her youth and the possibility that she might be too tolerant for this type of case, (2) her demeanor, (3) her marital status–Single with no ties, (4) her lack of ties to the community, and (5) her gender. The prosecutor did not strike a white juror who possessed the same objective characteristics as Juror 016. The trial court rejected the prosecutor's attempt to justify her strike on the basis of Juror 016's gender, but appeared to credit the prosecutor's discussion of Juror 016's youthful age and her alleged demeanor as race-neutral justifications. The prosecutor also struck Juror 019, noting her youth and daughter's former

drug problem. The jury found Collins guilty of the possession charge and also found that Collins had been convicted of robbery and forcible rape in 1982. Accordingly, with three felony convictions, the court sentenced him to a three strikes term of 25 years to life in state prison.

The California Court of Appeal affirmed Collins' conviction and sentence, concluding that the trial court properly accepted the prosecutor's youthful age and demeanor justifications as race-neutral. The California Court of Appeal determined that because the trial court did not observe the prospective juror's demeanor, the trial court permitted the prosecutor to exclude prospective Juror 016 based solely on her age. However, noting that nothing in the present record, including the trial court's decision to give the prosecutor the benefit of the doubt as to prospective Juror 016's demeanor, indicated that the trial court did not approach its task appropriately, the appellate court determined that the trial court's decision was entitled to deference. The California Supreme Court denied both Collins' petition for review and his petition for a writ of habeas corpus. The district court denied Collins' federal habeas petition.

Collins appealed.

**[1]** The Equal Protection Clause forbids prosecutors from exercising peremptory challenges on the basis of race. **[2]** Because the trial court determined that Collins had established a prima facie case, the prosecutor was required to articulate a race-neutral explanation. **[3]** Youthful age and demeanor are not characteristics peculiar to a given race or group-based presuppositions applicable in all criminal trials to African-American jurors. **[4]** Thus, the California Court of Appeal's determination that age was a race-neutral justification for excusing Juror 016 was not contrary to, or an unreasonable application of, clearly established law.



**[5]** Although age has been upheld as a proper basis for excusing a potential juror, the prosecutor attempted to equate Juror 016's youthful age with a possible bias favoring criminal defendants facing drug charges. **[6]** According to the Supreme Court, Juror 016's age had to be related to the particular case to be tried. Instead, the prosecutor's reason for excluding Juror 016 related to the prosecutor's beliefs that Juror 016 might be sympathetic to an individual charged with drug possession and that she lacked ties to the community. **[7]** Not only was the prosecutor's statement that Juror 016 had a lack of ties in the community not sufficiently clear and reasonably specific, but it was also not supported by the record and did not appear to have any relation to Juror 016's ability to serve as a juror in a criminal trial involving possession of crack cocaine. **[8]** There was clear and convincing evidence that the prosecutor's stated concern over Juror 016's youthful age was a pretext for discrimination, evidence that the state appellate court did not address in unreasonably concluding that the prosecutor had dismissed Juror 016 on the basis of her age.

**[9]** There was substantial evidence supporting Collins' contention that the prosecutor dismissed Juror 016 because of her race–evidence that the appellate court failed to address. The trial record demonstrated that the prosecutor's justifications for dismissing Juror 016 on the basis of her age were contrary to the record (likely tolerance of drug offenders), were unrelated to her ability to serve as a juror in Collins' case (lack of community ties), and were not applied equally to white jurors (single with no children). The record also showed that one of her justifications was patently discriminatory (gender), while one of her justifications for dismissing Juror 019 was contrary to the record (age). In sum, the record demonstrated that the prosecutor's proffered reasons for dismissing Juror 016 were wholly implausible, unpersuasive, and a pretext for discrimination on the basis of her race.

**[10]** Collins thus showed by clear and convincing evidence that the state appellate court's determination, that the prosecutor did not purposefully discriminate on the basis of race in striking Juror 016, was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. **[11]** Contrary to the appellate court's assessment of the record the trial court did not fulfill its duty by determining that Collins had failed to prove purposeful discrimination when the prosecutor failed to offer any credible justification for striking Juror 016. The appellate court's contrary determination demonstrated that it unreasonably concluded that the trial court had fulfilled its duty to determine whether Collins had shown purposeful discrimination. **[12]** It had to be concluded that the state trial appellate court committed constitutional error that warranted the grant of a writ of habeas corpus under § 2254. The judgment of the district court had to be reversed.

Judge Hall dissented, writing that both the majority opinion and the record were devoid of any basis for concluding that the prosecutor's statements and demeanor left the trial judge with no permissible alternative but to reject the prosecutor's race-neutral justifications.

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## COUNSEL

Karen H. Bucur, Laguna Hills, California, argued the case for the appellant.

Erika D. Jackson, Deputy Attorney General, Los Angeles, California, argued the case for the appellees.



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## ORDER

The opinion filed November 7, 2003 is **AMENDED** as follows:

1. Page 15915, line 14: delete "and 019" and change "Jurors" to "Juror."

2. Footnote 12, line 2: after "challenge" insert "because the prosecutor labeled Juror 019 'young' even though Juror 019 was a grandmother.

3. Delete the first full paragraph on page 15917.

4. Delete "her pretextual justifications for dismissing Juror 019," on line 2-3 of the last paragraph on page 15917.

5. The first full sentence on page 15919 should be amended to read: "The record also shows that one of her justifications was patently discriminatory (gender), while one of her justifications for dismissing Juror 019 was contrary to the record (age)."

6. Footnote 15, lines 16-17: change "three reasons were not applied to comparably similar jurors who were not struck" to "one reason was not applied to a comparable similar juror who was not struck."

7. Delete the following from page 15922: ", while her justification based on Juror 019's daughter's past cocaine addiction was pretextual given that a white juror (Juror 030) with comparably similar characteristics was permitted to serve on the jury."

8. Page 15922, line 19: change "Jurors" to "Juror" and delete "and 019".

With these amendments, the panel majority has voted to deny the petition for panel rehearing and petition for rehearing en banc. Judge Hall voted to grant the petition for panel rehearing, and recommended granting the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

**BEA**, Circuit Judge with whom **KLEINFELD**, **GOULD**, **TALLMAN**, and **CALLAHAN**, Circuit Judges, join, dissenting from the denial of rehearing en banc:

I respectfully dissent from the court's denial of the state's petition for a rehearing en banc because the majority opinion seriously undermines the ability of a trial court to judge the sincerity of counsel's reason for a peremptory challenge to a juror when a *Batson/Wheeler*[1] challenge is made.

Collins is an African American who was convicted of possession of 0.1 grams of rock cocaine. It was his third felony conviction; he was sentenced to 25 years to life under California's "three strikes" law. The sentence in this case is harsh; from it, the majority opinion makes bad law.

On the basis of the prosecutor's peremptory challenge of *one* African American prospective juror, the majority opinion reverses a denial of habeas corpus and orders a new trial.

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1. *Batson v. Kentucky*, 476 U.S. 79 (1986); *People v. Wheeler*, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978).



The trial court enquired of and listened to the prosecutor's race-neutral reasons for using a peremptory strike against an African American prospective juror, weighed the evidence both for and against concluding that the strike was racially motivated, and decided the prosecutor was credible and that her reasons for making the strike were indeed race-neutral. The Court of Appeal affirmed.

In reversing this determination on the habeas petition, the majority opinion demeans demeanor evidence and nitpicks the record to find that, as a matter of law, the trial judge cannot find the prosecutor credible if there is evidence in the record to support the opposite conclusion. Instead of reviewing the evidence for clear error the majority conducted a denovo review in this case.

The majority opinion completely disregards the evidence supporting the trial judge's decision that the prosecutor was being truthful when she said she struck Juror 016 on the following permissible grounds: Juror 016 was young; the prosecutor thought Juror 016 appeared too tolerant for this type of case; Juror 016 had exhibited disrespect for the court by turning away and rolling her eyes when requested to answer "Yes" or "No" rather than "Uh-huh"; and Juror 016 was single, with no ties to the community.

The majority says it finds compelling evidence sufficient to overcome the deference it says it accords trial court credibility findings in three particulars: the prosecutor said that Jurors 016 and 019 were both young, when in fact 019 was a grandmother;[2] the trial judge said he did not personally see

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2. This was an incorrect observation, but one not objected to or rebutted by defense counsel. From the colloquy it appears that everyone in that room knew the prosecutor meant to compare Juror 016 to Juror 006.

Juror 016 roll her eyes in disrespect;[3/] and the prosecutor said she was also challenging Juror 016 due to her gender, a ground which the trial judge immediately rejected as unconstitutional.

The prosecutor's statement that Juror 016 rolled her eyes is critical to this case. If someone rolls her eyes when another speaks to her, the eye-rolling implies disrespect and rejection. The panel opinion concluded, irrationally, that because the trial judge did not see the eye-rolling, the state appellate court was unreasonable in approving the prosecutor's strike. The reason this is irrational is that it does not matter whether the state trial judge noticed the eye-rolling, or even whether there actually was any eye-rolling. All that matters is whether the prosecutor intentionally lied about the eye-rolling to make an excuse for getting an African American woman off the jury. If the prosecutor was really striking Juror 016 because she thought the juror rolled her eyes and not because she was African American, she had a right to strike her, even if she was mistaken about whether the eye-rolling actually occurred. In this case, the trial judge thought the prosecutor was telling truth, and the state appeals court saw no reason to doubt it.

The record is uncontradicted that while the prosecutor was stating her reasons for the exercise of this single challenge, she was at all times within the sight of the trial judge, who observed her demeanor and sincerity. Indeed, at the end of counsel's presentation on the issue, the judge commented he would give the "benefit of the doubt" to the prosecutor's reason for the challenge.

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3. Defense counsel remained mute as to whether she had seen Juror 016 roll her eyes in disrespect. California law allows the trier of fact to consider the failure to deny or explain contrary evidence as probative of that evidence. *See* Cal. Evid. Code § 413; Cal. BAJI 2.04.



Without the benefit of the trial judge's observations and on a cold record containing ample evidence supporting the prosecutor's stated reasons for the strike, the majority concludes that the state court's findings amount to a misapplication of *Batson* and an objectively unreasonable deduction from the evidence presented.

That conclusion in effect eliminates the ability of the trial judge to make determinations of sincerity and credibility based on observation of counsel's demeanor in justifying a peremptory challenge. This is directly contrary to the teachings of the Supreme Court:

> In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within the trial judge's province."

*Hernandez v. New York*, 500 U.S. 352, 364-65 (1991) (citations omitted).

Although acknowledging *Hernandez*, the majority opinion in effect eliminates the rule that requires us to defer to the trial judge on credibility findings in *Batson* challenges. Now, our panels can pick and choose among bits of circumstantial evidence, whether or not that evidence was challenged at trial or on appeal, to determine whether an attorney was telling the truth in her reasons for peremptory strikes, without regard to the

attorney's demeanor.[4] *See* Judge Hall's dissent. 348 F.3d at 1100.

The value of the trial judge's observation of demeanor in determining credibility has long been a mainstay of our jurisprudence:

> There can be no doubt that seeing a witness testify live assists the finder of fact in evaluating the witness's credibility. As the Supreme Court stated in *Anderson v. City of Bessemer* 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518[] (1985): "[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Id.* at 575, 105 S. Ct. 1504[.] Live testimony enables the finder of fact to see the witness's physical reactions to questions, to assess the witness's voice–matters that cannot be gleaned from a written transcript. Because the district judge is able to hear testimony live and to view the witnesses as they testify, his credibility findings are entitled to deference on appeal.

*United States v. Mejia*, 69 F.3d 309, 315 (9th Cir. 1995).

The prosecutor represented that she saw Juror 016 roll her eyes in disrespect for the trial court, and the trial judge believed she was truthful. The majority opinion now requires that trial

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4. This directly conflicts with the California jury instruction that allows juries to consider "the demeanor and manner of the witness while testifying" in determining the believabilty of a witness. *See* Cal. BAJI 2.20. If juries are allowed to weigh a witness' credibility, there is no logical reason a trial judge cannot do the same.



judge to detail why he thought the prosecutor *was* credible, or else this court will presume she was *not*. Why we should presume a prosecutor, who is an officer of the court, is not credible when the trial judge found that she was is beyond all logic. For a contrary result in a similar case, see *Williams v. Rhoades*, 354 F.3d 1101 (9th Cir. 2004), which properly accorded deference to the trial judge's findings in a *Batson* challenge.

In addition, the panel's opinion, although citing 28 U.S.C. § 2254(d), departs from the spirit, if not the letter, of the statute in its application of the statute to the facts in this case. As noted, the panel substitutes its own inferences drawn from the cold record for the perspectives of the trial court and the state appellate court. The panel then insists that any perspective other than its own, must be unreasonable. In my opinion, this is not consistent with the statute's limitation of federal habeas relief to instances where the state court decision "was contrary to, or involved an unreasonable application of clearly established Federal law," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

En banc rehearing was necessary to avoid arguments between counsel battling over whether the standard in *Collins* or the standard in *Williams*[5] applies. Those battles will now rage with no end in sight. Accordingly, I respectfully dissent from the denial of rehearing en banc.

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5. *See Williams v. Rhoades* 354 F.3d 1101 (9th Cir. 2004) where three African Americans were struck, habeas relief denied, and that denial affirmed by this court.

## OPINION

PAEZ, Circuit Judge:

Steven Collins appeals the district court's order denying his 28 U.S.C. § 2254 petition for a writ of habeas corpus. During jury selection prior to his state court trial for possession of a controlled substance, Collins, an African-American male, alleged that race motivated the prosecutor's peremptory strikes against two African-American women in the jury venire in violation of *People v. Wheeler*,[1] but the state trial court rejected Collins' *Wheeler* motion. The jury found him guilty of the possession charge and also found that Collins had been convicted of robbery and forcible rape in 1982. Accordingly, with three felony convictions, the court sentenced him to a three strikes term of twenty-five years to life in state prison.[2] The California Court of Appeal affirmed his conviction and sentence, and the California Supreme Court denied both Collins' petition for review and his petition for a writ of habeas corpus.

We have jurisdiction pursuant to 28 U.S.C. § 2253, and we conclude that the California Court of Appeal's decision that the prosecutor did not engage in purposeful discrimination during jury selection represents (1) an unreasonable determination of the facts in light of the evidence presented at trial, and (2) an objectively unreasonable application of clearly established law. Accordingly, we reverse with instructions to grant the petition.

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1. 22 Cal. 3d 258 (1978).

2. *See* Cal. Penal Code Ann. § 667(e)(2)(A) (West 1999).



## BACKGROUND

After Collins was discovered in possession of 0.10 grams of powder cocaine in March 1996, the State of California charged him with possession of a controlled substance in violation of California Health and Safety Code section 11350(a). When jury selection began, the trial court excused ten of the original thirty-three members of the venire. Of the remaining twenty-three, three appeared to be African-American.[3]

During voir dire, Juror 016, one of two African-American women in the venire, stated that she lived in Inglewood, California, was single, had no children, no prior jury experience, no prior employment experience in law enforcement; and worked as an automations clerk for the Federal Aviation Administration. She also stated that no one close to her had ever been accused of a drug-related offense, nor had anyone close to her had a problem with alcohol or drugs, and that she had no reason to believe that drug dealers operated in her neighborhood. When asked whether she thought that possession of rock cocaine ought to be against the law, she answered "yes." Juror 016 also told the court that there was nothing about the nature of the charge of possession of rock cocaine that might make it difficult for her to sit on a case involving drug charges. The prosecutor exercised a peremptory challenge to excuse Juror 016.

Juror 019, the other African-American woman in the

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3. At a later point in the proceeding, the prosecutor argued that there were in fact four African-American jurors in the venire. She identified one female juror as being "of" African-American color, black color," but defense counsel clarified that although she was a "woman of color," this juror was not in fact African-American.

venire, told the court that she lived in Inglewood, California, was single with seven grown children,[4] and was currently a retired nurse. She also stated that she had no relatives or close friends in law enforcement and had never had an experience with a police officer that was "particularly positive or particularly negative." At one time, her youngest daughter had a problem with drugs. Juror 019 had no idea what kind of drugs but thought that it might have been cocaine. Juror 019 stated that she "was involved in" her daughter's struggle with addition and "had to help her," but that she did not think that anything about her relationship with her daughter or the daughter's cocaine problem would affect her ability to be fair and impartial in Collins' case.

After the prosecutor exercised another peremptory challenge to excuse Juror 019, defense counsel made a motion pursuant to *People v. Wheeler*, 22 Cal. 3d 258,[5] alleging that

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4. When asked to provide her children's occupations, Juror 019 stated that "[t]he oldest one is a computer manager for a company in Van Nuys. Another one is a clinical social worker, works for herself now. One son has his own mechanic shop; one does not work. The other one is in Arizona working for McDonnell Douglas. The youngest is at home with five kids."

5. *Wheeler* is the "California analogue" to *Batson v. Kentucky*, 476 U.S. 79 (1986). *Lewis v. Lewis*, 321 F.3d 824, 827 n.5 (9th Cir. 2003). Although aspects of *Wheeler* differ from *Batson*, notably the requirements for establishing a prima facie case of discrimination, *see Copperwood v. Cambra*, 245 F.3d 1042, 1046-47 (9th Cir. 2001), the state trial court's finding that Collins established a prima facie case is not in dispute. Because the relevant aspects of the two cases are the same, and because we are reviewing Collins' petition for a writ of habeas corpus under 28 U.S.C. § 2254, we refer to *Batson* in



the prosecutor had improperly dismissed Jurors 016 and 019 on the basis of race. The trial court determined that Collins had established a prima facie case of racial discrimination and thus asked the prosecutor to justify her peremptory challenges. The prosecutor responded:

> Ms. 016 as well as Ms. 019 were both young and I was concerned with them being too tolerant of this type of case. Also, Ms. 016 made a remark when the judge made a response to her comment "uh-huh," she turned away and rolled her eyes. I don't think you asked her specifically to give a yes or no, but she went "yes," and rolled her eyes and turned away from the court. She and Mr. 006 were both single, no ties.
>
> [Defense Counsel]: Who is 006?
>
> [Prosecutor]: He is the white juror. That was the reason, the justification, for excusing her, rather than her being an African-American. 019, she also had a daughter having a drug problem and she talked about not knowing much about what drug it was, things like that. She was not sufficiently educated in some areas to decide a case like this. But it is beyond any of her experience.

The judge, outside the presence of the prospective jurors, asked the prosecutor if she had any additional justifications to offer for striking the two African-American female jurors. The following colloquoy took place.

> [Prosecutor]: I was the one to bring to the court's attention that the two African-American jurors that were excused were both female and the defendant is

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analyzing his claims.

a male and there is a male African-American on the jury that has been on it since the beginning, I believe, of this case, of the jury panel that were seated. And there is a second female juror that is of African-American color, black color, on the jury, still seated. That is it, your honor, at this point. Does the court need cases for those types of reasons as being upheld in other courts, age and gender and inexperience with a certain subject area?

The Court: I'll let you know. [Defense counsel], would you like to be heard?

[Defense counsel]: Yes. [Prosecutor] has talked about looking for more male/female balance. I thought the court was asking each of these potential jurors if they could be fair. And I don't think that should be decided upon their gender. [Prosecutor] has compared Ms. 016 to Mr. 006, who she excused by saying they are both young and she didn't feel she was getting enough information. If she wanted more information, she could have asked the court to ask more questions of Ms. 019 . . . .

[Prosecutor]: I don't have exact citations here for the court, but *People v. Ortega*, which also talks about the jury being balanced between young and old and men and women.

. . .

The Court: I recall the United States Supreme Court saying the use of peremptory challenges based on gender is improper. I don't see, [Prosecutor], that you are seeking to justify excusing people of one ethnicity based on their gender. I don't think that is



going to cut it.

[Prosecutor]: I think I tied that into a lack of ties in the community with both of them; that that was one factor that I considered, that is, the manner in which I stated that they could–that their youth was important. It was not that I don't want any young people on the jury. There are, I believe, other young people on the jury.

After considering these arguments, the court denied the *Wheeler* motion. With regard to Juror 019, the court stated that it was "satisfied that at least one race and gender neutral explanation was offered for the exercise of that peremptory challenge, that being Ms. 109's experience with a family member who had a drug problem." As to Juror 016, the court stated that it, "frankly, did not observe the demeanor of Ms. 016 that was complained of by the district attorney. However, Ms. 016 was a youthful person, as was 006. And one or more other prospective jurors also. The court is prepared to give the district attorney the benefit of the doubt as to Ms. 016."

After sentencing, Collins appealed his conviction and properly exhausted his remedies in both the California Court of Appeal and the California Supreme Court. Collins challenged the trial court's denial of his *Wheeler* motion only with respect to Juror 016. On November 19, 1998, Collins filed a petition for writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254. Ultimately, the district court dismissed his petition. Noting that the trial court had not observed Juror 016's demeanor, the district court concluded that it had to respect the trial court's decision to give the prosecutor the benefit of the doubt because Collins had not rebutted this decision with "clear and convincing evidence." The district court subsequently granted Collins' request for a certificate of appealability as to "[w]hether the petitioner's rights were violated under *Batson v.*

*Kentucky* . . .where the prosecution exercised a peremptory challenge against an African-American juror ostensibly on the ground of the juror's age and demeanor."

## I.

Because the California Supreme Court denied Collins' petition for review without comment, our analysis begins with the decision of the California Court of Appeal, an unpublished disposition. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Shackleford v. Hubbard*, 234 F.3d 1077, 1079 n.2 (9th Cir. 2000). In affirming the trial court's ruling, the state appellate court adopted the reasons cited by the trial court; thus, our analysis "will necessarily include discussion of the trial court's decision as well." *Lewis*, 321 F.3d at 829.

The California Court of Appeal determined that "because the trial court did not observe the prospective juror's demeanor, the trial court permitted the prosecutor to exclude prospective [J]uror [N]o. 016 based solely on her age." Citing both *Wheeler* and *Batson*, the state appellate court further rejected Collins' contention that age was an improper basis upon which to justify a peremptory challenge, noting that age groups are not a cognizable class and that peremptory challenges to "youthful and/or immature prospective jurors repeatedly have been upheld as proper." Even assuming that the prosecutor's reliance on Juror 016's young age was improper, the appellate court alternatively concluded that the trial court had engaged in a sincere and reasoned attempt to evaluate the prosecutor's justification, as "[j]urors may be excused on 'hunches' and even 'arbitrary' exclusion is permissible, so long as the reasons are not based on impermissible group bias." Noting that "nothing in the present record, including the trial court's decision to give the prosecutor the benefit of the doubt as to prospective [J]uror [N]o. 016's demeanor, indicates that the trial court did not approach its task appropriately," the appellate court determined



that the trial court's decision was entitled to deference.

We review Collins' petition according to the standards set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), as Collins filed his petition after April 24, 1996. We may only reverse a judgment of the state that was adjudicated on the merits if the state's decision was based on an objectively unreasonable determination of the facts in light of the evidence presented in the state court proceeding, 28 U.S.C. § 2254(d)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029, 1041 (2003), or if the state court's decision was "contrary to, or involve[s] an unreasonable application of, clearly established Federal law" as determined by "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision," *Andrade*, 123 S. Ct. at 1172 (citations omitted). We further note that the ultimate determination of whether the prosecutor evidenced an intent to discriminate in dismissing Juror 016 is a question of fact, *see Hernandez v. New York*, 500 U.S. 352, 367 (1991), and that under section 2254, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Collins therefore must prove that the state court's decision was "'objectively unreasonable' in light of the record before the court." *Miller-El*, 537 U.S. 322, 123 S.Ct. at 1045.

## II.

**[1]** The Equal Protection Clause forbids prosecutors from exercising peremptory challenges on the basis of race. *Batson*, 476 U.S. at 89. Where a defendant asserts that a prosecutor's peremptory challenges were racially-motivated, a court must apply a three-step process for evaluating a *Batson* claim. *Hernandez*, 500 U.S. at 358-60. First, the defendant must make

a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. *Id.*[6] Once a prima facie case is established, the burden shifts to the state to articulate a race-neutral explanation for the challenge. If the first two steps are satisfied, the court must then determine whether the defendant has carried his ultimate burden of proving purposeful discrimination.

**A.**

**[2]** Because the trial court determined that Collins had established a prima facie case, the prosecutor was required to articulate a race-neutral explanation –an explanation "based on something other than the race of the juror." *Hernandez*, 500 U.S. at 360; *see also Purkett v. Elem*, 514 U.S. 765, 767 (1995) (per curia). In assessing the race-neutrality of the prosecutor's explanation, we "must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law." *Hernandez*, 500 U.S. at 359. At this step, "the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral." *Stubby v. Gomez*, 189 F.3d 1099, 1105 (9th Cir. 1999) (internal quotation marks omitted). Although the prosecutor must give a "'clear and reasonably specific' explanation of his 'legitimate' reasons' and "the reason must be 'related to the particular case to be tried,'" *Purkett*, 514 U.S. at 768-69 (quoting *Batson*, 476 U.S. at 98 & n.20), "it is not until the *third* step that the

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6. We need not address the preliminary issue of whether Collins made a prima facie showing because the trial court ruled on the ultimate question of intentional discrimination under steps two and three of the *Batson* analysis. *Hernandez*, 500 U.S. at 359; *United States v. Killam*, 167 F.3d 1273, 1278 (9th Cir. 1999).



persuasiveness of the justifications becomes relevant." *Id.* at 768. For the purposes of step 2, the prosecutor's explanation need not be "persuasive, or even plausible." *Id.*

The prosecutor offered five reasons for excluding Juror 016: (1) her youth and the possibility that she might be "too tolerant for this type of case," (2) her demeanor, (3) her marital status–"single" with "no ties," (4) her lack of ties to the community, and (5) her gender.[7] The trial court rejected the prosecutor's attempt to justify her strike on the basis of Juror 016's gender, but appeared to credit the prosecutor's discussion of Juror 016's youthful age and her alleged demeanor as race-neutral justifications. The California Court of Appeal concluded that the trial court properly accepted the prosecutor's youthful age and demeanor justifications as race-neutral.

**[3]** Although Collins concedes that the prosecutor's explanations for striking Juror 016 "may appear to be race-neutral on their face," citing *United States v. Bishop*, 959 F.2d 820, 825 (9th Cir. 1992), he contends that rolling of the eyes, lack of ties in the community, and youthful age are not characteristics that would affect a juror's approach to a specific trial and therefore the prosecutor's explanations were "transparent proxies for racism." However, as Collins acknowledges, "[at this step of the inquiry, the issue is the *facial validity* of the prosecutor's explanation," *Hernandez*, 500 U.S. 360 (emphasis added), and, unlike the justifications offered in *Bishop*, 959 F.2d at 825, youthful age and the demeanor in question are not characteristics peculiar to a given race or "group-based presupposition applicable in all criminal trials" to African-American jurors. *Id.*

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7. As evidence that she did not dismiss Jurors 016 and 019 because their race, the prosecutor also noted that an African-American man and "a female juror that is of African-American color, black color" remained on the panel.

**[4]** Further, neither the Supreme Court nor any circuit has held that the Equal Protection Clause prohibits a prosecutor from striking potential jurors on account of age. *United States v. Pichay*, 986 F.2d 1259, 1260 (9th Cir. 1993); *United States v. Jackson*, 983 F.2d 757, 762 (7th Cir. 1993). Thus, the California Court of Appeal's determination that age was a race-neutral justification for excusing Juror 016 is not contrary to, or an unreasonable application of, clearly establish law. Alternatively, if the prosecutor had excluded Juror 016 because of her demeanor, this justification would not constitute a denial of equal protection, as discriminatory intent is not inherent in the prosecutor's explanation. *Hernandez*, 500 U.S. at 360. Because we find no error in the California Court of Appeal's analysis at step 2, we proceed to step 3.

**B.**

In the third step of a *Batson* challenge, the trial court has "the duty to determine whether the defendant has established purposeful discrimination," *Batson*, 476 U.S. at 98, and therefore must evaluate the "persuasiveness" of the prosecutor's proffered reasons, *see Purkett* , 514 U.S. at 768. In determining whether the defendant has carried this burden, the Supreme Court provides that "a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Batson*, 476 U.S. at 93 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); *see also Hernandez*, 500 U.S. at 363. "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination ." *Purkett* , 514 U.S. at 768; *see also Lewis*, 321 F.3d at 830 ("[I]f a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination.")

In the end, a finding of discriminatory intent turns largely



on the trial court's evaluation of the prosecutor's credibility, *see Batson*, 476 U.S. at 98 n.21, because "[t]he credibility of the prosecutor's explanation goes to the heart of the equal protection analysis," *Hernandez*, 500 U.S. at 367. Indeed, "[i]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Id.* at 365. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El*, 537 U.S. 322, 123 S. Ct. at 1040. Although we afford great deference to the trial court's observations of the prosecutor's demeanor and intent, "[d]eference does not by definition preclude relief." *Id.* at 1041; *see also Lewis*, 321 F.3d at 821 ("The proffer of various faulty reasons and only one or two otherwise adequate reasons, may undermine the prosecutor's credibility to such an extent that a court should sustain a *Batson* challenge.") *United States v. Chinchilla*, 874 F.2d 695, 698-99 (9th Cir. 1989) (holding that although reasons given by prosecutor "would normally be adequately 'neutral' explanations taken at face value, the fact that two of the four proffered reasons do not hold up under judicial scrutiny militates against their sufficiency"); *Johnson v. Vasquez*, 3 F.3d 1327, 1331 (9th Cir. 1993) (noting that courts are not required to accept neutral reasons that are either unsupported by the record or are refuted by it).

In assessing the prosecutor's proffered justifications for excluding Juror 016, the state trial and appellate courts made unreasonable factual determinations in light of the evidence presented in the state court proceeding and unreasonably applied clearly established federal law as determined by the Supreme Court. With a careful eye towards "such circumstantial and direct evidence of intent as [was] available" to the appellate court, *Batson*, 476 U.S. at 93 (internal quotation marks omitted), we address each of the justifications relied

upon by the California courts.

### 1. Age

The state court of appeal determined that the prosecutor had dismissed Juror 016 solely on the basis of her age. The court explained that because youth was not a cognizable class for purposes of the cross-section rule and because youth had been recognized as a permissible justification for dismissal in the past, Collins had failed to demonstrate purposeful discrimination. However, the appellate court's conclusion is troubling in several respects.

**[5]** First, although age has been upheld as a proper basis for excusing a potential juror, *see Pichay*, 986 F.2d at 1259, here, the prosecution explained that Juror 016's youthful age might make her "too tolerant for this type of case." Thus, the prosecutor attempted to equate her youthful age with a possible bias favoring criminal defendants facing drug charges. The prosecutor also later explained that Juror 016's youthful age was "important" because of her "lack of ties in the community," stating, "I think I tied that into a lack of ties in the community with both [Juror 016 and 019]; that was one factor that I considered, that is, the manner in which I stated that they could --that their youth was important."

**[6]** According to the Supreme Court, Juror 016's age must be "related to the particular case to be tried," *Batson*, 476 U.S. at 98, and must have some relevance to Juror 016's "possible approach to a specific trial," *Bishop*, 959 F.2d at 825. Indeed, although the prosecutor claimed that Juror 016's youthful age was of concern, she later explained that it was *not* the general presence of young jurors on the jury that concerned her. Rather, in referring to Jurors 016 and 019, the prosecutor stated "[i]t was not that I don't want any young people on the jury. There are, I believe, other young people on the jury." Thus, in



explaining that she was not trying to exclude all young jurors from the jury, the prosecutor clarified that her reason for excluding Juror 016 was not her youthful age at all. Instead, her reason for excluding Juror 016 related to particular characteristics that the prosecutor associated with her youth–namely, the prosecutor's beliefs that Juror 016 might be sympathetic to an individual charged with drug possession and that she lacked ties to the community.[8]

The state court of appeal, however, glossed over the prosecutor's clarification and found that the sole basis upon which the trial court had permitted the prosecutor to exclude Juror 016 was her age. It concluded that because the exclusion of jurors on the basis of their age did not violate the Fourteenth Amendment, Collins had failed to meet his burden of proving purposeful discrimination. However, the state appellate court's

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8. The fact that the trial court acknowledged that Juror 016 "was a youthful person, as was 006[,a]nd one or more other prospective jurors also,"is of no moment. Although the trial court seemed to credit the prosecutor's proffered youthful age justification by a cross-racial comparison of youthful jurors who were excused (the record implies that Juror 006 was not member of a racial minority), the court ignored the prosecutor's clarification that she did not strike Juror 016 because of her "youth," but rather because Juror 016 may have been "too tolerant for this type of case."

We further note that the record contains no information regarding Juror 016's age, save the trial court judge's statement that Juror 016 "was a youthful person, as was 006." Although the trial court is certainly in the best position to view demeanor, credibility, and other intangibles in the courtroom, age is an objective fact that is not so easily discerned by appearance. Thus, the record fails to establish just how old Juror 016 might have been.

characterization of the prosecutor's reason for striking Juror 016 was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Indeed, the evidence in the trial record is clear and convincing that the prosecutor's proffered justifications for striking Juror 016 on the basis of her youthful age–possible tolerance of drug use and lack of ties to the community–were pretexts for purposeful discrimination.

With regard to Juror 016's possible tolerance,[9] during voir dire, Juror 016 answered "yes" to the court's question regarding whether she believed that possession of cocaine should be against the law, and she also told the court that there was nothing about the nature of the charge of possession of rock cocaine that might make it difficult for her to sit on Collins' case. There is no other evidence in the record that remotely suggests that Juror 016 was otherwise sympathetic to or tolerant of individuals involved with drug use or possession. Juror 016 told the court that neither she nor her family members or any of her close friends had ever had a problem with drugs or alcohol; nor had they ever been accused of committing a crime involving illegal drugs. No other information regarding drug use, drug laws, or criminal enforcement of drug laws was solicited by the court or counsel, and Juror 016 never gave the court any information regarding her age. The prosecutor's clarification that Juror 016 might be "too tolerant for this type of case" as a basis for striking Juror 016 is therefore contrary to the evidence in the record. *See Purkett* , 514 U.S. at 768 ("[I]mplausible or fantastic justifications may (and probably will) be found to be

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9. Although the fact that Juror 016's purported tolerance "corresponds to a valid for-cause challenge [helped] demonstrate its race-neutral character" at step 2, *Hernandez*, 500 U.S. at 363, the fact that nothing in the record supports the prosecutor's claim erodes the credibility of her explanation at step 3.



pretexts for purposeful discrimination."); *McClain v. Prunty*, 217 F.3d 1209, 1221 (9th Cir. 2000) (rejecting prosecutor's attempt to attribute to challenged juror "beliefs that she did not hold" about "mistrust[-ing] the system," where juror never made such a statement and indicated to the court that she did believe her son had been treated fairly by "the system").

The prosecutor later attempted to explain that Juror 016 was "single, no ties," presumably indicating that she was not married and possibly had no children. However, as we have already explained, *Batson* is clear that the prosecutor's proffered justifications must be reasonably "related to the particular case to be tried." 476 U.S. at 98; *see also Bishop*, 959 F.2d at 825 (stating that a prosecutor's reason for dismissing a potential juror must have some nexus to her "possible approach to specific trial"). The trial court record fails to establish how Juror 016's marital or parental status would have had any bearing on her ability to serve as a juror in a case involving prosecution for crack cocaine possession, and the prosecutor failed to offer any such explanation. Further, the record shows that the prosecutor did not strike Juror 015, a white juror who possessed the same objective characteristics as Juror 016: both were single, employed females with no children who responded to the court's questions in the same manner, thereby revealing the pretextual nature of this justification.[10] *See United States v. Alanis*, 335 F.3d 965, 969

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10. The prosecutor attempted to prove the race-neutral character of this justification by comparing Juror 016 with Juror 006, a white male, noting "[s]he and Mr. 006 were both single, no ties," *See Turner v. Marshall*, 121 F.3d 1248, 1251-52 (9th Cir. 1997) ("A comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination."). The record reveals, however, that Jurors 016 and 006 had very different backgrounds and thus did not possess

(9th Cir. 2003) ("Peremptory challenges cannot be lawfully exercised against potential jurors of one gender unless potential jurors of another gender with comparable characteristics are also challenged."); *Lewis*, 321 F.3d at 832-33 ("[A] comparative analysis of D.F. with empaneled jurors reveals that a finding of pretext was warranted."); *McClain*, 217 F.3d at 1221-22 (holding that where a non-black juror with no prior jury experience was empaneled, the proffered reason for striking a black juror for lack of jury experience was not

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"comparable characteristics" for purposes of the cross-racial analysis discussed in *Turner*, Juror 006, like Juror 016 was single, but, in contrast to Juror 016, Juror 006 had never been employed and, significantly, had an uncle who was a recovered alcoholic. This evidence is inconsistent with the prosecutor's assertion that there was a white juror with comparable characteristics who was dismissed for being single with no children. *Compare Burks v. Borg*, 27 F.3d 1424, 1429 (9th Cir. 1994) (holding that counsel may treat minority and nonminority jurors differently when there are subjective differences between them, although that party cannot insulate an explanation from appellate review simply by couching it in "vague and subjective terms") *with Turner*, 121 F.3d at 1251-52 (perceiving no basis to distinguish a challenged and unchallenged juror and holding that their similarity provided evidence of pretext); *cf. United States v. Lewis*, 837 F.2d 415, 417 & n.5 (9th Cir. 1988) (concluding that there was no evidence of pretext when the decision to strike the juror turned on "the interplay of various factors" identified by the prosecutor and "no unchallenged juror possessed all the cited characteristics").

We further note that, contrary to the suggestion made by the dissent, because Jurors 006 and 016 did not possess comparable characteristics, the comparison between the two did not provide a potential reason for the trial court to conclude that the prosecutor was credible.



genuine and therefore was pretextual); *cf. Miller-El*, 537 U.S. 322, 123 S. Ct. at 1043 (noting the fact that "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged" showed that the strikes "might have been selective and based on racial considerations").

**[7]** The prosecutor also claimed that Juror 016's youth was "important" because of her "lack of ties in the community," stating, "I think I tied that into a lack of ties in the community with both [Juror 016 and Juror 019]; that was one factor that I considered, that is, the manner in which I stated that they could–that their youth was important." Not only is the prosecutor's statement that Juror 016 had a "lack of ties in the community" not sufficiently "clear and reasonably specific," *Batson*, 476 U.S. at 98 n.20, but it is also not supported by the record and does not appear to have any relation to Juror 016's ability to serve as a juror in a criminal trial involving possession of crack cocaine. *See id.* at 88 (holding that the prosecutor's exercise of peremptory challenges must be "related to his view concerning the outcome") (internal quotation marks omitted); *McClain*, 217 F.3d at 1223 (stating that where the prosecutor did not explain the significance of a juror's body language, the prosecutor's claim that he struck that juror "on the sole basis that she had her elbow on the chair is patently frivolous," especially where no other evidence in the record indicated any possible bias).

**[8]** In sum, there was clear and convincing evidence that the prosecutor's stated concern over Juror 016's youthful age was a pretext for discrimination, evidence that the state appellate court did not address in unreasonably concluding that the prosecutor had dismissed Juror 016 on the basis of her age. This evidence supports Collins' claim that the prosecutor struck Juror 016 because of her race, and also demonstrates that the state appellate court was unreasonable when it determined that

the trial court did not err by determining that Collins had failed to prove purposeful discrimination. However, because the appellate court offered Juror 016's demeanor as an alternative explanation, we must assess whether the court unreasonably determined that the trial court had properly accepted that justification as nondiscriminatory before determining the ultimate significance of the appellate court's conclusion regarding Juror 016's age.

**2. Demeanor**

The state court of appeal also concluded that even if the prosecutor's reliance on Juror 016's youthful age had been improper, the "prosecutor reasonably could have interpreted prospective [Juror 016's] body language as indicative of hostility or disrespect" and properly dismissed her on that basis. Although the trial court did not witness Juror 016's alleged offensive conduct, the appellate court determined there was "*nothing* in the present record" indicating that the trial court should not have given the prosecutor the benefit of the doubt or that it had failed to evaluate whether the prosecutors' justifications should have been accepted.

As the record reflects, the state appellate court reasonably determined that the trial court had not observed Juror 016's demeanor but nonetheless accepted this alternate reason for striking Juror 016 on the basis of the prosecutor's credibility. Because the trial court did not observe Juror 016's demeanor, the critical question here is whether the appellate court's determination that the trial court properly credited the prosecutor's representation was unreasonable.[11/] Notably, the

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11. In response to the prosecutor's characterization of Juror 016's alleged conduct, the trial court responded: "the court, frankly, did not observe the demeanor of Ms. 016 that was complained of by the district attorney." In light of the trial court's statement and the fact that there is nothing in the trial



basis for the state appellate court's determination was its conclusion that there was "nothing in the present record" to indicate that the trial court did not conduct a searching inquiry in giving the prosecutor the benefit of the doubt or should have questioned the prosecutor's credibility. We conclude that this determination was unreasonable determination of the facts because the prosecutor failed to offer any credible justification for striking Juror 016.

First, we note that the prosecutor consistently identified Jurors 016 and 019 as "both young."[12/] However, the record

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transcript (except the prosecutor's representation) which indicates that Juror 016 answered any question by stating "uh-huh" or that she had rolled her eyes or turned away, the appellate court reasonably determined that the trial court had accepted the prosecutor's statements about Juror 016's demeanor as true. Its corresponding conclusion–that a peremptory challenge exercised on the basis of a juror's body language would not be improper–was also reasonable. *See Burks*, 27 F.3d at 1429 & n.3 (noting that trial counsel's evaluation of a potential juror's demeanor, tone, and facial expressions may lead to a "hunch" or "suspicion" that the juror might be biased, and that a peremptory challenge based on this reason would be legitimate); *United States v. Power*, 881 F.2d 733, 740v (9th Cir. 1989) (accepting as legitimate the government's explanation that a juror's "fidgeting and looking around as he sat in the jury box . . . made the prosecutor believe that the individual would not be an attentive juror").

12. Although Collins does not challenge the prosecutor's strike against Juror 019, this strike is relevant to Collins' *Batson* challenge because the prosecutor labeled Juror 019 "young" even though Juror 019 was a grandmother. *See Hernandez*, 500 U.S. at 363 (holding that a prosecutor's motive "may often be inferred from the totality of relevant facts")

reveals that Juror 019 was at least a middle-aged grandmother. Indeed, Juror 019 informed the court that she was a retired nurse with seven grown children, the youngest of which had five children of her own. A prosecutor supplied with this information could not credibly identify Juror 019 as young. This incorrect factual statement supports Collins' argument that the prosecutor was not credible. *See McCain*, 217 F.3d at 1222 (holding that reasons for excusing black jurors that were objectively contradicted by the record provided evidence of purposeful discrimination); *Caldwell v. Mahoney*, 159 F.3d 639, 651 (1st Cir. 1998) (holding that serious questions of pretext arise when the facts in the record are "objectively contrary to" the prosecutor's proffered justifications).

In addition, the trial court judge rejected the prosecutor's justification for striking Jurors 016 and 019 on the basis of gender. This too supports the argument that the prosecutor dismissed Juror 016 on the basis of her race.[13] *See Lewis*, 321

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(internal quotation marks omitted); *Purkett*, 514 U.S. at 768-69 (holding that at step three, the trial court must evaluate the persuasiveness of the prosecutor's justification); *Batson*, 476 U.S. at 98 (holding that the trial court must decide whether the prosecutor's explanation for the strike is pretextual); *United States v. Hill*, 146 F.3d 337, 342 (6th Cir. 1998) (noting that the trial court "has the responsibility to assess the prosecutor's credibility under all of the pertinent circumstances, and then to weigh the asserted justification against the strength of the defendant's prima facie case under the totality of the circumstances:).

13. In rejecting the prosecutor's initial references to gender, the trial court explained: "I recall the United States Supreme Court saying the use of peremptory challenges based on gender is improper. I don't see . . . that you are seeking to justify excusing people of one ethnicity based on their gender.



F.3d at 834 (stating that the fact that the trial court had found some of the prosecutor's arguments unconvincing "does not support the prosecutor's credibility; it undermines it"). Further, the fact that the prosecutor attempted to offer a facially discriminatory justification for dismissing the only black female jurors in the venire, and then quickly abandoned this justification when informed by the trial judge that it was improper, is another indication that the prosecutor's stated justifications were a pretext for discrimination. *Miller-El*, 537 U.S. 322, 123 S. Ct. at 1040 ("Credibility can be measured by, among other factors, the prosecutor's demeanor, by how reasonable, or how improbable, the explanations are.").

The prosecutor's objectively unreasonable statements regarding Juror 019's age, and her attempt to use gender as a race-neutral basis for excluding Jurors 016 and 019, combined with her pretextual justifications for dismissing Juror 016 on the basis of her alleged lack of community ties, her marital status, and her purported tolerance, and the fact that nothing in the record corroborated her allegations regarding Juror 016's demeanor, provide "clear and convincing evidence" that the prosecutor did not dismiss Juror 016 on the basis of her demeanor. In light of the evidence in the record, the appellate court's determination that the prosecutor dismissed Juror 016 because of her demeanor was an unreasonable determination of the facts. Because this determination provided the basis for the appellate court's conclusion that the trial court had not clearly erred in accepting the prosecutor's justification as race-neutral, this determination also was objectively unreasonable, *See Johnson*, 3F.3d at 1331 ("When there is reason to believe that there is a racial motivation for the challenge" we are not "bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it."); *Lewis*, 321 F.3d at 833-34 (holding that where justification for strike was not

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I don't think that is going to cut it."

corroborated by the record and the prosecutor was not credible, the proffered justification could not support state court's conclusion that petitioner had failed to prove purposeful discrimination).

C.

The state court of appeal held that Collins had failed to establish purposeful discrimination on the basis of its objectively unreasonable determination that the prosecutor properly dismissed Juror 016 because of her age. The appellate court's alternative ruling–that the trial court properly credited the prosecutor's assertion that Juror 016 had rolled her eyes and turned away from the court when asked a question during voir dire, and that her dismissal based on Juror 016's demeanor did not proved any evidence of purposeful discrimination–is also unsupported by the record. Thus, clear and convincing evidence demonstrates that there was no credible basis for dismissing Juror 016 on the basis of her age of demeanor.

**[9]** there is, however, substantial evidence supporting Collins' contention that the prosecutor dismissed Juror 016 because of her race–evidence that the appellate court failed to address. The trial record demonstrates that the prosecutor's justifications for dismissing Juror 016 on the basis of her age were contrary to the record (likely tolerance of drug offenders), were unrelated to her ability to serve as a juror in Collins' case (lack of community ties), and were not applied equally to white jurors (single with no children). The record also shows that one of her justifications was patently discriminatory (gender), while her justifications for dismissing Juror 019 were contrary to the record (age) and patently pretextual (daughter's former drug problem). In sum, the record demonstrates that the prosecutor's proffered reasons for dismissing Juror 016 were wholly implausible, unpersuasive, and a pretext for discrimination on



the basis of her race.[14]

In order to secure habeas relief, however, Collins "must demonstrate that [the] state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was 'objectively unreasonable' in light of the record before the court." *Miller-El*, 537 U.S. 322, 123 S. Ct. at 1045. We conclude that Collins has met this heavy burden.

1.

**[10]** The facts underlying the appellate court's conclusion, namely that the trial court properly accepted the prosecutor's justification that Juror 016 was young and had exhibited an improper demeanor, are unsupported by the record. Collins' claim of pretext, however, is supported by the record–the record contains clear and convincing evidence that the prosecutor's reasons for striking Jurors 016 and 019 were pretextual. Thus, not only were the state appellate court's factual determinations not supported by the record, but the record also demonstrates that the appellate court's ultimate conclusion that the trial court did not err in finding that Collins failed to establish purposeful discrimination was objectively unreasonable. The fact that the appellate court failed to address all the evidence relating to the

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14. The fact that a black man and "a female juror that [was] of African-American color, black color" remained in the venire does not alter our conclusion. *See Turner*, 121 F.3d at 1254 ("[A]lthough the fact that the prosecutor accepted four African-Americans on the jury may be considered indicative of a nondiscriminatory motive, [] it is not dispositive."); *Palmer v. Estelle* but may not rely solely on, the existence of Blacks on a jury when determining whether a prosecutor has violated *Batson*.")

prosecutor's justification for striking Juror 016 and indeed disregarded this evidence by stating that "nothing in the present record . . . indicates the trial court did not approach its task appropriately" highlights the objective unreasonableness of its assessment of the record. Collins has thus shown by "clear and convincing evidence" that the state appellate court's determination, that the prosecutor did not purposefully discriminate on the basis of race in striking Juror 016, "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2).[15]

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15. Contrary to the assertion in the dissent, we have not substituted our own judgment for that of the state court. "Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court *can disagree* with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Miller-El*, 123 S. Ct. at 1041; *see also Hall v. Dir. of Corrs*, 343 F.3d 976, 984 n.8 (9th Cir. 2003) ("AEDPA, although emphasizing proper and due deference to the state court's findings, did not eliminate federal habeas review. Where there are real, credible doubts about the veracity of essential evidence and the person who created it, AEDPA does not require us to turn a blind eye.") Critical to our analysis are the ten different reasons offered by the prosecutor for dismissing Jurors 016 and 019. As our analysis reflects, one of the reasons was facially discriminatory, two reasons were contradicted by the record, one reason was not applied to a comparably similar juror who was not struck, and four reasons were without any support in the record.



**2.**

Further, although the appellate court identified the three-step inquiry for identifying purposeful discrimination under *Batson*, it unreasonably applied *Batson*'s third prong in determining that the trial court had fulfilled its *duty* to determine whether Collins had established purposeful discrimination. *See Andrade*, 123 S. Ct. at 1174 (citing *Williams v. Taylor*, 529 U.S. 362 (2000)). It is well-established that "once the prosecutor offers a race-neutral basis for his exercise of peremptory challenges, the trial court then has the *duty to determine if the defendant has established purposeful discrimination."* Hernandez, 500 U.S. at 363 (emphasis added) (internal quotation marks omitted); *id.* at 359 (holding that the "trial court *must* determined whether the defendant has carried his burden of proving purposeful discrimination") (emphasis added); *Batson*, 476 U.S. at 98 ("The trial court will then have the *duty* to determine if the defendant has established purposeful discrimination.") (emphasis added). As the Supreme Court has emphasized, "[i]n deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available,'" *Batson*, 476 U.S. at 93 (quoting *Arlington Heights*, 429 U.S. at 266), and must evaluate the "genuineness of the [prosecutor's] motive," *Purkett* , 514 U.S. at 769. Thus, a state appellate court's decision that overlooked a trial court's failure to evaluate the persuasiveness of the prosecutor's justifications in conducting this inquiry would rest on an unreasonable application of well-established Supreme Court precedent. *See Lewis*, 321 F.3d at 832 ("Unlike the trial court, a court of appeal is not in an ideal position to conduct a step three evaluation. It can, however, use the trial court's findings and the evidence on the record to evaluate the support on the record for the prosecutor's reasons and credibility, and to compare the struck and empaneled jurors.")

Here, the appellate court's determination that "nothing in the present record" indicated that the trial court failed to evaluate the prosecutor's credibility must have been based either (1) upon a conclusion that there was no evidence that undermined her credibility or (2) upon a belief that the record demonstrated that the trial court had assessed any such evidence in evaluating the persuasiveness of the prosecutor's justification. The record belies either conclusion.

**[11]** As we have discussed, the prosecutor's attempt to justify her challenge of Juror 016 on the basis of her age, specifically on account of her marital status, her alleged lack of community ties, and her purported tolerance, was unsupported by the record. In addition, the prosecutor's attempt to justify her strike of Juror 019 on the basis of her youthful age was contradicted by the record. The trial court acknowledged that it had not observed Juror 016's alleged demeanor, and nothing in the record corroborates the prosecutor's allegations. It also rejected the prosecutor's justifications relating to gender as clearly violative of the Fourteenth Amendment. Thus, contrary to the appellate court's assessment of the record, the trial court did not fulfill its duty by determining that Collins had failed to prove purposeful discrimination when the prosecutor failed to offer any credible justification for striking Juror 016. The appellate court's contrary determination demonstrates that, although it recognized the trial court's duty under *Batson* to determine whether Collins had show purposeful discrimination, it unreasonably applied that principle in concluding that the trial court had done so.

## IV.

**[12]** Because the basis for the appellate court's decision was its unreasonable determination of the facts in light of the evidence presented at the trial, and because it also unreasonably applied clearly established federal law as determined by the



Supreme Court, we conclude that the state trial appellate court committed constitutional error that warrants the grant of a writ of habeas corpus under section 2254. We therefore reverse the district court's judgment and remand with instructions to grant the petition on conditions it deems appropriate.[16]

**REVERSED and REMANDED.**

**HALL**, Circuit Judges, dissenting:

The state trial court determined that the prosecutor's proffered race-neutral justifications for striking Juror 016 were credible. This conclusion is entitled to "great deference," *Hernandez v. New York*, 500 U.S. 352, 364 (1991), and may not be disturbed on appeal unless clearly erroneous. *Id.* at 369; *see also Miller-El v. Cockrell*, 123 S. Ct. 1029, 1041 (2003) (reasoning that because an appellate court has access only to the trial transcript, it is "not as well positioned as the trial court is to make credibility determinations."). Applying this deferential standard, the California Court of Appeal found that the trial court did not err. Because this case is governed by AEDPA, we must defer to the California Court of Appeal's conclusion unless contrary to, or an unreasonable application of, clearly established Supreme Court precedent, or premised on an unreasonable factual finding. 28 U.S.C. § 2254(d).

The majority does not defer to the California Court of Appeal. According to the majority, deference is unwarranted because the Court of Appeal's decision rests upon the "unreasonable factual determination" that "there was 'nothing in the present record' to indicated that the trial court did not

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16. In light of our disposition, we need not address Collins' 8th Amendment argument that his three strikes sentence was cruel and unusual. *But see Andrade*, 123 S. Ct. 1166.

conduct a searching inquiry in giving the prosecutor the benefit of the doubt or should have questioned the prosecutor's credibility." In point of fact, the Court of Appeal held only that the trial court's *ultimate* decision to credit the prosecutor was not clearly erroneous, thereby adhering to the well-established principle that "where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Hernandez*, 500 U.S. at 369.

Having manufactured a reason to disregard the California Court of Appeal's decision, the majority essentially reviews the issue of the prosecutor's credibility *de novo*, concluding that the writ should issue because, under the majority's view, "the record belies" the conclusion that the trial court assessed evidence which ostensibly undermined the prosecutor's credibility. In doing do, the majority disregards the canonical rule that evaluation of a prosecutor's credibility "lies peculiarly within a trial judge's province," and is entitled to "great deference." *Id.* at 366[1]

Viewing the record in its entirety, I am firmly convinced that the California Court of Appeal's decision was reasonable. I respectfully dissent.

* * * *

The majority identifies four consideration potentially relevant to the prosecutor's credibility. In order to reject the

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1. Contrary to the majority's view, the state appellate court has no duty to make its own purposeful discrimination determination. Indeed, this would beyond the scope of the state appellate court's review. In the *Batson* context, a state appellate court's duty is limited to determining whether the *trial court's* purposeful discrimination finding was *clearly erroneous*. *E.g.*, *Hernandez*, 500 U.S. at 366-67.



California Court of Appeal's decision, we would have to conclude that the Court of Appeal *unreasonably* determined that, given these four considerations, the trial court did not *clearly err* by crediting the prosecutor's race-neutral explanation. As the following discussion illustrates, the majority falls far short of making this requisite demonstration.

The majority argues that the trial court should have questioned the prosecutor's credibility because she referred to *another* prospective juror, Juror 019, as "young" even though Juror 019 was a grandmother of five. As the majority suggests, the prosecutor may have either been entirely incapable of judging a person's age or may have intentionally misrepresented Juror 019's age to the court. A fair more plausible explanation, on the other hand, is that the reference to Juror 019 as "young" was purely accidental. The statement at issue occurred during a discussion about Juror 016, Juror 019, and Juror 006, a young ,single white male against whom the prosecutor also exercised a peremptory strike. Because Jurors 016 and 019 were the subject of the *Batson* challenge, both jurors were repeatedly referred to in tandem. Similarly, Jurors 016 and 0066 were referred to together several times by the prosecutor, who argued that the two young, single jurors were similarly situated. In this context, it is not surprising that the prosecutor would, on one occasion, flip the designations "006" and "019." Indeed, defense counsel also seemed confused about the numerical designations, once mistakenly referring to Juror 016 as "Ms. 019."[2] Both the trial judge and defense counsel clearly indicated that they

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2. After noting that one of the prosecutor's justifications for striking *Juror 016* was a lack of information, defense counsel argued, "if [the prosecutor] wanted more information, she could have asked the court to ask more questions of *Ms. 019*."

understood the prosecutor's justification for striking Juror 019 to be her daughter's drug problem, and the prosecutor's justification for striking Juror 016 to be that, like Juror 006, she was young, single, and potentially tolerant.[3] Under these circumstances, the majority's focus on the prosecutor's misstatement,[4] an issue that was not briefed by the parties, is nothing short of absurd.

The majority also argues that the trial judge should have questioned the prosecutor's credibility because the prosecutor cited a desire to have "more male-female balance" in the jury as a race-neutral basis for excluding Juror 016. The majority places undue emphasis on the prosecutor's arguably improper reference to gender. The prosecutor cited a variety of other race-neutral justifications, including Juror 016 demeanor, youth, marital status, and possible tolerance. There is no indication in Supreme Court precedent, or in cases from our circuit for that matter, that a trial judge's decision to reject *one* of the prosecutor's race-neutral justifications compels the trial judge to reject *all* of the other race-neutral justifications offered by that prosecutor.[5] In the instant case, the trial judge

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3. Summarizing the prosecution's argument, defense counsel stated: "[The prosecutor] has compared Ms. 016 to Mr. 006, which she excused by saying they were both young. . . . And Ms. 019, certainly, indeed, said that she had . . . one daughter which she said a cocaine problem and that she had been involved with treatment for the daughter."

4. Indeed, the prosecutor's "incorrect factual statement" is the majority's lead argument in support of its conclusion that the trial court clearly erred in considering the prosecutor to be credible.

5. The majority quotes this court's decision in *Johnson v. Vasquez*, 3F.3d 1327 (9th Cir. 1993), for the proposition that "'[w]hen there is reason to believe that there is a racial



rejected the prosecutor's gender-balance justification, but nonetheless chose to credit the prosecutor's other race-neutral justifications for the challenge. The majority highlights

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motivation of the challenge,' we are not 'bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it.'" *Id.* at 1331. This reference is misleading, however, First of all, the *Johnson* court was confronted with a case in which the prosecutor's own statements "strongly suggest[ed] that [he] responded to defense counsel's alleged exclusions of other minority venire members by excluding a member of defendant's race." *Id.* at 1330. Hence, this court's admonition that "when there is reason to believe that there is a racial motivation for the challenge . . . we are not bound" was a direct reference to the prosecutor's tacit admission that he was excluding members of the venire based on their ethnicity, an integral element of the *Johnson* decision which is not present in the instant case.

Second, the majority omits crucial language from the *Johnson* decision which bears on its relevance to the case at bar. Specifically, we noted that "*neither the trial courts nor we* are bound to accept" the prosecutor's ostensibly neutral rationales at face value. *Id.* at 1331 (emphasis added). Viewed in context, the language from our *Johnson* decision clarifies the majority's fundamental mistake in this case. Once the trial court decides to "accept at face value" a "list of neutral reasons" proffered by the prosecutor, we are bound by precedent to grant that decision "great deference." *Hernandez*, 500 U.S. at 366

Finally, even if the language from *Johnson* were pertinent to the instant case, it nonetheless fails to dispute the point that, even if a trial or appellate court chose not to accept *one* (or more) of the prosecutor's articulated justifications, they would not thereby be compelled to reject *all* of the proffered rationales.

nothing in the record to indicate that the California Court of Appeal should have deemed this decision *clearly erroneous*.

The third credibility issue raised by the majority also relates to Juror 019 rather than Juror 016. Making an argument not presented by Collins either before this court or before the California Court of Appeal, the majority contends that the prosecution's explanation that Juror 019 had a daughter recently treated for cocaine addition was pretextual because a white juror passed by the prosecution, Juror 030, also had a child with a cocaine problem. There are several fundamental problems with the majority's analysis of this issue. The issue was not briefed by the parties or discussed at oral argument, and the record itself certainly does not contain clear and convincing evidence that Juror 019 and Juror 030 were, as the majority terms them, "indistinguishably similar."[6] Moreover, even if one accepts the majority's shaky premise that Jurors 019 and 030 were

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6. For example, Juror 019's daughter's cocaine problem were more recent (two years) than was Juror 030's son's problem (six years). There may also have been significant differences in the demeanor of each prospective juror that are not evident from the trial transcript.

By way of contrast, compare the majority's conclusion that Juror 019 and 030 are indistinguishable to its own discussion of the dissimilarity of Jurors 006 and 016, which is relegated to a footnote. In support of its claim that the prosecutor's alleged rationales for dismissing Juror 016 (her marital status and lack of community ties) were pretextual, even though Juror 006 was also dismissed on the same grounds, the majority summarily concludes that "[t]he record reveals . . . that Jurors 006 and 016 had very different backgrounds and thus did not possess 'comparable characteristics,'" even though Jurors 006 and 016 "were both single, no ties."



"indistinguishably similar," there is no Supreme Court precedent indicating that a race-neutral justification is necessarily pretextually merely because it applies to another member of the venire. Similarly, there is a complete dearth of Supreme Court precedent indicating that a trial judge may not credit a prosecutor's race-neutral justification if there is reason to believe that the race-neutral justification given for *another* juror was pretextual. For these reasons, the prosecutor's conduct vis-avis Juror 019 lends very little, if any, support to the majority's conclusion that the trial judge should have questioned the prosecutor's explanation for striking Juror 016.

Finally, the majority contends that the prosecutor's explanation that Juror 016 was a youthful single person, and therefore potentially too tolerant, was not credible. Noting that Juror 016 "believed possession of crack cocaine should be illegal," the majority concludes that the prosecutor's concern that Juror 016 might be too tolerant for this three strikes case was "patently frivolous." The majority's conclusion is simply untenable — the theory that young persons, even those who believe crack cocaine should be illegal and don't expressly indicate any heightened tolerance for drug offenders, may be less willing to impose harsh sentences for drug possession than their older counterparts in the venire can hardly be considered unreasonable, much less "implausible or fantastic."

Indeed, the majority's own analysis demonstrates precisely why the Court of Appeal properly deferred to the trial court's judgment. The majority strains to find that the credibility issues discussed above constitute "clear and convincing" evidence which not only undermines the prosecutor's credibility, but makes clear that the prosecutor's articulated rationales for her peremptories were "wholly implausible." Viewing the majority's credibility argument

generously, however, their conclusion is merely that the trial court had several potential reasons to question the prosecutor's credibility. Presumably, the trial court also had a variety of potential reasons to believe that the prosecutor *was* credible, including the prosecutor's ostensibly truthful comparison between Juror 016 and Juror 006. Significantly, the trial judge also had the ability to observe the prosecutor's demeanor to determine whether she appeared to be telling the truth, evidence which would not be evident in the record. Both the majority opinion and the record are devoid of any basis for concluding that the prosecutor's statements and demeanor left the trial judge with *no permissible alternative* but to reject the prosecutor's race-neutral justifications. *See Hernandez*, 500 U.S. at 369 ("Where there are two permissible views of the evidence, the fact-finder's choice between the cannot be clearly erroneous." *See also Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (stating that Section 2254 "demands that state court decisions be given the benefit of the doubt").

For the forgoing reasons, I would affirm.

# APPENDIX B

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

MARTELL COLLINS,
*Petitioner-Appellant,*

v.

BERTRAM RICE; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
*Respondents-Appellees.*

No. 01-56958

D.C. No.
CV-98-09329-TJH

OPINION

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Chief District Judge, Presiding

Argued and Submitted
June 5, 2003–Pasadena, California

Filed November 7, 2003

Before: Cynthia Holcomb Hall, Sidney R. Thomas, and Richard A. Paez, Circuit Judges.

Opinion by Judge Paez;
Dissent by Judge Hall

## SUMMARY

### Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court. The court held that substantial evidence can support a drug offender's contention that the prosecutor dismissed an African American juror because of her race, where the prosecutor's justifications for dismissing the juror on the basis of her age were contrary to the record (likely tolerance of drug offenders), were unrelated to her ability to serve as a juror in the case (lack of community ties), and were not applied equally to white jurors (single with no children); and where one of the prosecutor's justifications was patently discriminatory (gender), while her justifications for dismissing another African American were contrary to the record (age) and patently pretextual (daughter's former drug problem).

Appellant Steven Collins petitioned for a writ of habeas corpus in district court under 28 U.S.C. § 2254, alleging that race motivated the prosecutor's peremptory strikes against two African-American women, Juror 016 and Juror 019, a middle-aged grandmother, during jury selection prior to his California state court trial for possession of a controlled substance. The prosecutor offered five reasons for excluding Juror 016: (1) her youth and the possibility that she might be too tolerant for this type of case, (2) her demeanor, (3) her marital status–Single with no ties, (4) her lack of ties to the community, and (5) her gender. The prosecutor did not strike a white juror who possessed the same objective characteristics as Juror 016. The trial court rejected the prosecutor's attempt to justify her strike on the basis of Juror 016's gender, but appeared to credit the prosecutor's

discussion of Juror 016's youthful age and her alleged demeanor as race-neutral justifications. The prosecutor also struck Juror 019, noting her youth and daughter's former drug problem. The jury found Collins guilty of the possession charge and also found that Collins had been convicted of robbery and forcible rape in 1982. Accordingly, with three felony convictions, the court sentenced him to a three strikes term of 25 years to life in state prison.

The California Court of Appeal affirmed Collins' conviction and sentence, concluding that the trial court properly accepted the prosecutor's youthful age and demeanor justifications as race-neutral. The California Court of Appeal determined that because the trial court did not observe the prospective juror's demeanor, the trial court permitted the prosecutor to exclude prospective Juror 016 based solely on her age. However, noting that nothing in the present record, including the trial court's decision to give the prosecutor the benefit of the doubt as to prospective Juror 016's demeanor, indicated that the trial court did not approach its task appropriately, the appellate court determined that the trial court's decision was entitled to deference. The California Supreme Court denied both Collins' petition for review and his petition for a writ of habeas corpus. The district court denied Collins' federal habeas petition.

Collins appealed.

**[5]** Although age has been upheld as a proper basis for excusing a potential juror, the prosecutor attempted to equate Juror 016's youthful age with a possible bias favoring criminal defendants facing drug charges. **[6]** According to the Supreme Court, Juror 016's age had to be related to the particular case to be tried. Instead, the prosecutor's reason for excluding Juror 016 related to the prosecutor's beliefs that Juror 016 might be sympathetic to an individual charged with



drug possession and that she lacked ties to the community. **[7]** Not only was the prosecutor's statement that Juror 016 had a lack of ties in the community not sufficiently clear and reasonably specific, but it was also not supported by the record and did not appear to have any relation to Juror 016's ability to serve as a juror in a criminal trial involving possession of crack cocaine. **[8]** There was clear and convincing evidence that the prosecutor's stated concern over Juror 016's youthful age was a pretext for discrimination, evidence that the state appellate court did not address in unreasonably concluding that the prosecutor had dismissed Juror 016 on the basis of her age.

**[9]** There was substantial evidence supporting Collins' contention that the prosecutor dismissed Juror 016 because of her race–evidence that the appellate court failed to address. The trial record demonstrated that the prosecutor's justifications for dismissing Juror 016 on the basis of her age were contrary to the record (likely tolerance of drug offenders), were unrelated to her ability to serve as a juror in Collins' case (lack of community ties), and were not applied equally to white jurors (single with no children). The record also showed that one of her justifications was patently discriminatory (gender), while her justifications for dismissing Juror 019 were contrary to the record (age) and patently pretextual (daughter's former drug problem). In sum, the record demonstrated that the prosecutor's proffered reasons for dismissing Juror 016 were wholly implausible, unpersuasive, and a pretext for discrimination on the basis of her race.

**[10]** Collins thus showed by clear and convincing evidence that the state appellate court's determination, that the prosecutor did not purposefully discriminate on the basis of race in striking Juror 016, was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. **[11]** Contrary to the appellate

court's assessment of the record the trial court did not fulfill its duty by determining that Collins had failed to prove purposeful discrimination when the prosecutor failed to offer any credible justification for striking Jurors 016 and 019. The appellate court's contrary determination demonstrated that it unreasonably concluded that the trial court had fulfilled its duty to determine whether Collins had shown purposeful discrimination. **[12]** It had to be concluded that the state trial appellate court committed constitutional error that warranted the grant of a writ of habeas corpus under § 2254. The judgment of the district court had to be reversed.

Judge Hall dissented, writing that both the majority opinion and the record were devoid of any basis for concluding that the prosecutor's statements and demeanor left the trial judge with no permissible alternative but to reject the prosecutor's race-neutral justifications.

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## COUNSEL

Karen H. Bucur, Laguna Hills, California, argued the case for the appellant.

Erika D. Jackson, Deputy Attorney General, Los Angeles, California, argued the case for the appellees.

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## OPINION

PAEZ, Circuit Judge:

Steven Collins appeals the district court's order denying his 28 U.S.C. § 2254 petition for a writ of habeas corpus. During jury selection prior to his state court trial for



possession of a controlled substance, Collins, an African-American male, alleged that race motivated the prosecutor's peremptory strikes against two African-American women in the jury venire in violation of *People v. Wheeler*,[1] but the state trial court rejected Collins' *Wheeler* motion. The jury found him guilty of the possession charge and also found that Collins had been convicted of robbery and forcible rape in 1982. Accordingly, with three felony convictions, the court sentenced him to a three strikes term of twenty-five years to life in state prison.[2] The California Court of Appeal affirmed his conviction and sentence, and the California Supreme Court denied both Collins' petition for review and his petition for a writ of habeas corpus.

We have jurisdiction pursuant to 28 U.S.C. § 2253, and we conclude that the California Court of Appeal's decision that the prosecutor did not engage in purposeful discrimination during jury selection represents (1) an unreasonable determination of the facts in light of the evidence presented at trial, and (2) an objectively unreasonable application of clearly established law. Accordingly, we reverse with instructions to grant the petition.

## BACKGROUND

After Collins was discovered in possession of 0.10 grams of powder cocaine in March 1996, the State of California charged him with possession of a controlled substance in violation of California Health and Safety Code section 11350(a). When jury selection began, the trial court excused ten of the original thirty-three members of the venire.

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1. 22 Cal. 3d 258 (1978).

2. *See* Cal. Penal Code Ann. § 667(e)(2)(A) (West 1999).

Of the remaining twenty-three, three appeared to be African-American.[3]

During voir dire, Juror 016, one of two African-American women in the venire, stated that she lived in Inglewood, California, was single, had no children, no prior jury experience, no prior employment experience in law enforcement; and worked as an automations clerk for the Federal Aviation Administration. She also stated that no one close to her had ever been accused of a drug-related offense, nor had anyone close to her had a problem with alcohol or drugs, and that she had no reason to believe that drug dealers operated in her neighborhood. When asked whether she thought that possession of rock cocaine ought to be against the law, she answered "yes." Juror 016 also told the court that there was nothing about the nature of the charge of possession of rock cocaine that might make it difficult for her to sit on a case involving drug charges. The prosecutor exercised a peremptory challenge to excuse Juror 016.

Juror 019, the other African-American woman in the venire, told the court that she lived in Inglewood, California, was single with seven grown children,[4] and was currently a

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3. At a later point in the proceeding, the prosecutor argued that there were in fact four African-American jurors in the venire. She identified one female juror as being "of" African-American color, black color," but defense counsel clarified that although she was a "woman of color," this juror was not in fact African-American.

4. When asked to provide her children's occupations, Juror 019 stated that "[t]he oldest one is a computer manager for a company in Van Nuys. Another one is a clinical social worker, works for herself now. One son has his own mechanic shop; one does not work. The other one is in Arizona working



retired nurse. She also stated that she had no relatives or close friends in law enforcement and had never had an experience with a police officer that was "particularly positive or particularly negative." At one time, her youngest daughter had a problem with drugs. Juror 019 had no idea what kind of drugs but thought that it might have been cocaine. Juror 019 stated that she "was involved in" her daughter's struggle with addition and "had to help her," but that she did not think that anything about her relationship with her daughter or the daughter's cocaine problem would affect her ability to be fair and impartial in Collins' case.

After the prosecutor exercised another peremptory challenge to excuse Juror 019, defense counsel made a motion pursuant to *People v. Wheeler*, 22 Cal. 3d 258,[5] alleging that the prosecutor had improperly dismissed Jurors 016 and 019 on the basis of race. The trial court determined that Collins had established a prima facie case of racial discrimination and thus asked the prosecutor to justify her peremptory challenges. The prosecutor responded:

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for McDonnell Douglas. The youngest is at home with five kids."

5. *Wheeler* is the "California analogue" to *Batson v. Kentucky*, 476 U.S. 79 (1986). *Lewis v. Lewis*, 321 F.3d 824, 827 n.5 (9th Cir. 2003). Although aspects of *Wheeler* differ from *Batson*, notably the requirements for establishing a prima facie case of discrimination, *see Copperwood v. Cambra*, 245 F.3d 1042, 1046-47 (9th Cir. 2001), the state trial court's finding that Collins established a prima facie case is not in dispute. Because the relevant aspects of the two cases are the same, and because we are reviewing Collins' petition for a writ of habeas corpus under 28 U.S.C. § 2254, we refer to *Batson* in analyzing his claims.

Ms. 016 as well as Ms. 019 were both young and I was concerned with them being too tolerant of this type of case. Also, Ms. 016 made a remark when the judge made a response to her comment "uh-huh," she turned away and rolled her eyes. I don't think you asked her specifically to give a yes or no, but she went "yes," and rolled her eyes and turned away from the court. She and Mr. 006 were both single, no ties.

[Defense Counsel]: Who is 006?

[Prosecutor]: He is the white juror. That was the reason, the justification, for excusing her, rather than her being an African-American. 019, she also had a daughter having a drug problem and she talked about not knowing much about what drug it was, things like that. She was not sufficiently educated in some areas to decide a case like this. But it is beyond any of her experience.

The judge, outside the presence of the prospective jurors, asked the prosecutor if she had any additional justifications to offer for striking the two African-American female jurors. The following colloquoy took place.

> [Prosecutor]: I was the one to bring to the court's attention that the two African-American jurors that were excused were both female and the defendant is a male and there is a male African-American on the jury that has been on it since the beginning, I believe, of this case, of the jury panel that were seated. And there is a second female juror that is of African-American color, black color, on the jury, still seated. That is it, your honor, at this point. Does the court need cases for those types of reasons



as being upheld in other courts, age and gender and inexperience with a certain subject area?

The Court: I'll let you know. [Defense counsel], would you like to be heard?

[Defense counsel]: Yes. [Prosecutor] has talked about looking for more male/female balance. I thought the court was asking each of these potential jurors if they could be fair. And I don't think that should be decided upon their gender. [Prosecutor] has compared Ms. 016 to Mr. 006, who she excused by saying they are both young and she didn't feel she was getting enough information. If she wanted more information, she could have asked the court to ask more questions of Ms. 019 . . . .

[Prosecutor]: I don't have exact citations here for the court, but *People v. Ortega*, which also talks about the jury being balanced between young and old and men and women.

. . .

The Court: I recall the United States Supreme Court saying the use of peremptory challenges based on gender is improper. I don't see, [Prosecutor], that you are seeking to justify excusing people of one ethnicity based on their gender. I don't think that is going to cut it.

[Prosecutor]: I think I tied that into a lack of ties in the community with both of them; that that was one factor that I considered, that is, the manner in which I stated that they could–that their youth was important. It was not that I don't want any young

people on the jury. There are, I believe, other young people on the jury.

After considering these arguments, the court denied the *Wheeler* motion. With regard to Juror 019, the court stated that it was "satisfied that at least one race and gender neutral explanation was offered for the exercise of that peremptory challenge, that being Ms. 109's experience with a family member who had a drug problem." As to Juror 016, the court stated that it, "frankly, did not observe the demeanor of Ms. 016 that was complained of by the district attorney. However, Ms. 016 was a youthful person, as was 006. And one or more other prospective jurors also. The court is prepared to give the district attorney the benefit of the doubt as to Ms. 016."

After sentencing, Collins appealed his conviction and properly exhausted his remedies in both the California Court of Appeal and the California Supreme Court. Collins challenged the trial court's denial of his *Wheeler* motion only with respect to Juror 016. On November 19, 1998, Collins filed a petition for writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254. Ultimately, the district court dismissed his petition. Noting that the trial court had not observed Juror 016's demeanor, the district court concluded that it had to respect the trial court's decision to give the prosecutor the benefit of the doubt because Collins had not rebutted this decision with "clear and convincing evidence." The district court subsequently granted Collins' request for a certificate of appealability as to "[w]hether the petitioner's rights were violated under *Batson v. Kentucky* . . .where the prosecution exercised a peremptory challenge against an African-American juror ostensibly on the ground of the juror's age and demeanor."



## I.

Because the California Supreme Court denied Collins' petition for review without comment, our analysis begins with the decision of the California Court of Appeal, an unpublished disposition. *See Aalst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Shackleford v. Hubbard*, 234 F.3d 1077, 1079 n.2 (9th Cir. 2000). In affirming the trial court's ruling, the state appellate court adopted the reasons cited by the trial court; thus, our analysis "will necessarily include discussion of the trial court's decision as well." *Lewis*, 321 F.3d at 829.

The California Court of Appeal determined that "because the trial court did not observe the prospective juror's demeanor, the trial court permitted the prosecutor to exclude prospective [J]uror [N]o. 016 based solely on her age." Citing both *Wheeler* and *Batson*, the state appellate court further rejected Collins' contention that age was an improper basis upon which to justify a peremptory challenge, noting that age groups are not a cognizable class and that peremptory challenges to "youthful and/or immature prospective jurors repeatedly have been upheld as proper." Even assuming that the prosecutor's reliance on Juror 016's young age was improper, the appellate court alternatively concluded that the trial court had engaged in a sincere and reasoned attempt to evaluate the prosecutor's justification, as "[j]urors may be excused on 'hunches' and even 'arbitrary' exclusion is permissible, so long as the reasons are not based on impermissible group bias." Noting that "nothing in the pres[illegible]ecord, including the trial court's decision to give the pros[illegible] the benefit of the doubt as to prospective [J]uror [N][illegible] demeanor, indicates that the trial court did not app[illegible]s task appropriately," the appellate court deter[illegible]ed that the trial court's decision was entitled to deference.

We review Collins' petition according to the standards set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), as Collins filed his petition after April 24, 1996. We may only reverse a judgment of the state that was adjudicated on the merits if the state's decision was based on an objectively unreasonable determination of the facts in light of the evidence presented in the state court proceeding, 28 U.S.C. § 2254(d)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029, 1041 (2003), or if the state court's decision was "contrary to, or involve[s] an unreasonable application of, clearly established Federal law" as determined by "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision," *Andrade*, 123 S. Ct. at 1172 (citations omitted). We further note that the ultimate determination of whether the prosecutor evidenced an intent to discriminate in dismissing Juror 016 is a question of fact, *see Hernandez v. New York*, 500 U.S. 352, 367 (1991), and that under section 2254, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Collins therefore must prove that the state court's decision was "'objectively unreasonable' in light of the record before the court." *Miller-El*, 537 U.S. 322, 123 S.Ct. at 1045.

## II.

**[1]** The Equal Protection Clause forbids prosecutors from exercising peremptory challenges on the basis of race. *Batson*, 476 U.S. at 89. Where a defendant asserts that a prosecutor's peremptory challenges were racially-motivated, a court must apply a three-step process for evaluating a *Batson* claim. *Hernandez*, 500 U.S. at 358-60. First, the defendant must make a prima facie showing that the



prosecutor exercised a peremptory challenge on the basis of race. *Id.*[6] Once a prima facie case is established, the burden shifts to the state to articulate a race-neutral explanation for the challenge. If the first two steps are satisfied, the court must then determine whether the defendant has carried his ultimate burden of proving purposeful discrimination.

### A.

**[2]** Because the trial court determined that Collins had established a prima facie case, the prosecutor was required to articulate a race-neutral explanation –an explanation "based on something other than the race of the juror." *Hernandez*, 500 U.S. at 360; *see also Purkett v. Elem*, 514 U.S. 765, 767 (1995) (per curia). In assessing the race-neutrality of the prosecutor's explanation, we "must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law." *Hernandez*, 500 U.S. at 359. At this step, "the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral." *Stubby v. Gomez*, 189 F.3d 1099, 1105 (9th Cir. 1999) (internal quotation marks omitted). Although the prosecutor must give a "'clear and reasonably specific' explanation of his 'legitimate' reasons" and "the reason must be 'related to the particular case to be tried,'" *Purkett* , 514 U.S. at 768-69 (quoting *Batson*, 476 U.S. at 98 & n.20), "it is not until the *third* step that the persuasiveness of the

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6. We need not address the preliminary issue of whether Collins made a prima facie showing because the trial court ruled on the ultimate question of intentional discrimination under steps two and three of the *Batson* analysis. *Hernandez*, 500 U.S. at 359; *United States v. Killam*, 167 F.3d 1273, 1278 (9th Cir. 1999).

justifications becomes relevant." *Id.* at 768. For the purposes of step 2, the prosecutor's explanation need not be "persuasive, or even plausible." *Id.*

The prosecutor offered five reasons for excluding Juror 016: (1) her youth and the possibility that she might be "too tolerant for this type of case," (2) her demeanor, (3) her marital status–"single" with "no ties," (4) her lack of ties to the community, and (5) her gender.[7] The trial court rejected the prosecutor's attempt to justify her strike on the basis of Juror 016's gender, but appeared to credit the prosecutor's discussion of Juror 016's youthful age and her alleged demeanor as race-neutral justifications. The California Court of Appeal concluded that the trial court properly accepted the prosecutor's youthful age and demeanor justifications as race-neutral.

**[3]** Although Collins concedes that the prosecutor's explanations for striking Juror 016 "may appear to be race-neutral on their face," citing *United States v. Bishop*, 959 F.2d 820, 825 (9th Cir. 1992), he contends that rolling of the eyes, lack of ties in the community, and youthful age are not characteristics that would affect a juror's approach to a specific trial and therefore the prosecutor's explanations were "transparent proxies for racism." However, as Collins acknowledges, "[at this step of the inquiry, the issue is the *facial validity* of the prosecutor's explanation," *Hernandez*, 500 U.S. 360 (emphasis added), and, unlike the justifications offered in *Bishop*, 959 F.2d at 825, youthful age and the demeanor in question are not characteristics peculiar to a given race or "group-based presupposition applicable in all

7. As evidence that she did not dismiss Jurors 016 and 019 because their race, the prosecutor also noted that an African-American man and "a female juror that is of African-American color, black color" remained on the panel.



criminal trials" to African-American jurors. *Id.*

**[4]** Further, neither the Supreme Court nor any circuit has held that the Equal Protection Clause prohibits a prosecutor from striking potential jurors on account of age. *United States v. Pichay*, 986 F.2d 1259, 1260 (9th Cir. 1993); *United States v. Jackson*, 983 F.2d 757, 762 (7th Cir. 1993). Thus, the California Court of Appeal's determination that age was a race-neutral justification for excusing Juror 016 is not contrary to, or an unreasonable application of, clearly establish law. Alternatively, if the prosecutor had excluded Juror 016 because of her demeanor, this justification would not constitute a denial of equal protection, as discriminatory intent is not inherent in the prosecutor's explanation. *Hernandez*, 500 U.S. at 360. Because we find no error in the California Court of Appeal's analysis at step 2, we proceed to step 3.

**B.**

In the third step of a *Batson* challenge, the trial court has "the duty to determine whether the defendant has established purposeful discrimination," *Batson*, 476 U.S. at 98, and therefore must evaluate the "persuasiveness" of the prosecutor's proffered reasons, *see Purkett* , 514 U.S. at 768. In determining whether the defendant has carried this burden, the Supreme Court provides that "a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Batson*, 476 U.S. at 93 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); *see also Hernandez*, 500 U.S. at 363. "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination ." *Purkett* , 514 U.S. at 768; *see also Lewis*, 321 F.3d at 830 ("[I]f a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons

may be deemed a pretext for racial discrimination.")

In the end, a finding of discriminatory intent turns largely on the trial court's evaluation of the prosecutor's credibility, *see Batson*, 476 U.S. at 98 n.21, because "[t]he credibility of the prosecutor's explanation goes to the heart of the equal protection analysis," *Hernandez*, 500 U.S. at 367. Indeed, "[i]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Id.* at 365. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El*, 537 U.S. 322, 123 S. Ct. at 1040. Although we afford great deference to the trial court's observations of the prosecutor's demeanor and intent, "[d]eference does not by definition preclude relief." *Id.* at 1041; *see also Lewis*, 321 F.3d at 821 ("The proffer of various faulty reasons and only one or two otherwise adequate reasons, may undermine the prosecutor's credibility to such an extent that a court should sustain a *Batson* challenge.") *United States v. Chinchilla*, 874 F.2d 695, 698-99 (9th Cir. 1989) (holding that although reasons given by prosecutor "would normally be adequately 'neutral' explanations taken at face value, the fact that two of the four proffered reasons do not hold up under judicial scrutiny militates against their sufficiency"); *Johnson v. Vasquez*, 3 F.3d 1327, 1331 (9th Cir. 1993) (noting that courts are not required to accept neutral reasons that are either unsupported by the record or are refuted by it).

In assessing the prosecutor's proffered justifications for excluding Juror 016, the state trial and appellate courts made unreasonable factual determinations in light of the evidence presented in the state court proceeding and unreasonably applied clearly established federal law as determined by the



Supreme Court. With a careful eye towards "such circumstantial and direct evidence of intent as [was] available" to the appellate court, *Batson*, 476 U.S. at 93 (internal quotation marks omitted), we address each of the justifications relied upon by the California courts.

**1. Age**

The state court of appeal determined that the prosecutor had dismissed Juror 016 solely on the basis of her age. The court explained that because youth was not a cognizable class for purposes of the cross-section rule and because youth had been recognized as a permissible justification for dismissal in the past, Collins had failed to demonstrate purposeful discrimination. However, the appellate court's conclusion is troubling in several respects.

**[5]** First, although age has been upheld as a proper basis for excusing a potential juror, *see Pichay*, 986 F.2d at 1259, here, the prosecution explained that Juror 016's youthful age might make her "too tolerant for this type of case." Thus, the prosecutor attempted to equate her youthful age with a possible bias favoring criminal defendants facing drug charges. The prosecutor also later explained that Juror 016's youthful age was "important" because of her "lack of ties in the community," stating, "I think I tied that into a lack of ties in the community with both [Juror 016 and 019]; that was one factor that I considered, that is, the manner in which I stated that they could --that their youth was important."

**[6]** According to the Supreme Court, Juror 016's age must be "related to the particular case to be tried," *Batson*, 476 U.S. at 98, and must have some relevance to Juror 016's "possible approach to a specific trial," *Bishop*, 959 F.2d at 825. Indeed, although the prosecutor claimed that Juror 016's youthful age was of concern, she later explained that it was *not* the general presence of young jurors on the jury that

concerned her. Rather, in referring to Jurors 016 and 019, the prosecutor stated "[i]t was not that I don't want any young people on the jury. There are, I believe, other young people on the jury." Thus, in explaining that she was not trying to exclude all young jurors from the jury, the prosecutor clarified that her reason for excluding Juror 016 was not her youthful age at all. Instead, her reason for excluding Juror 016 related to particular characteristics that the prosecutor associated with her youth–namely, the prosecutor's beliefs that Juror 016 might be sympathetic to an individual charged with drug possession and that she lacked ties to the community.[8]

The state court of appeal, however, glossed over the prosecutor's clarification and found that the sole basis upon which the trial court had permitted the prosecutor to exclude

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8. The fact that the trial court acknowledged that Juror 016 "was a youthful person, as was 006[,a]nd one or more other prospective jurors also,"is of no moment. Although the trial court seemed to credit the prosecutor's proffered youthful age justification by a cross-racial comparison of youthful jurors who were excused (the record implies that Juror 006 was not member of a racial minority), the court ignored the prosecutor's clarification that she did not strike Juror 016 because of her "youth," but rather because Juror 016 may have been "tt tolerant for this type of case."

We further note that the record contains no information regarding Juror 016's age, save the trial court judge's statement that Juror 016 "was a youthful person, as was 006." Although the trial court is certainly in the best position to view demeanor, credibility, and other intangibles in the courtroom, age is an objective fact that is not so easily discerned by appearance. Thus, the record fails to establish just how old Juror 016 might have been.



Juror 016 was her age. It concluded that because the exclusion of jurors on the basis of their age did not violate the Fourteenth Amendment, Collins had failed to meet his burden of proving purposeful discrimination. However, the state appellate court's characterization of the prosecutor's reason for striking Juror 016 was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Indeed, the evidence in the trial record is clear and convincing that the prosecutor's proffered justifications for striking Juror 016 on the basis of her youthful age–possible tolerance of drug use and lack of ties to the community–were pretexts for purposeful discrimination.

With regard to Juror 016's possible tolerance,[9] during voir dire, Juror 016 answered "yes" to the court's question regarding whether she believed that possession of cocaine should be against the law, and she also told the court that there was nothing about the nature of the charge of possession of rock cocaine that might make it difficult for her to sit on Collins' case. There is no other evidence in the record that remotely suggests that Juror 016 was otherwise sympathetic to or tolerant of individuals involved with drug use or possession. Juror 016 told the court that neither she nor her family members or any of her close friends had ever had a problem with drugs or alcohol; nor had they ever been accused of committing a crime involving illegal drugs. No other information regarding drug use, drug laws, or criminal enforcement of drug laws was solicited by the court or

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9. Although the fact that Juror 016's purported tolerance "corresponds to a valid for-cause challenge [helped] demonstrate its race-neutral character" at step 2, *Hernandez*, 500 U.S. at 363, the fact that nothing in the record supports the prosecutor's claim erodes the credibility of her explanation at step 3.

counsel, and Juror 016 never gave the court any information regarding her age. The prosecutor's clarification that Juror 016 might be "too tolerant for this type of case" as a basis for striking Juror 016 is therefore contrary to the evidence in the record. *See Purkett* , 514 U.S. at 768 ("[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination."); *McCain v. Prunty*, 217 F.3d 1209, 1221 (9th Cir. 2000) (rejecting prosecutor's attempt to attribute to challenged juror "beliefs that she did not hold" about "mistrust[-ing] the system," where juror never made such a statement and indicated to the court that she did believe her son had been treated fairly by "the system").

The prosecutor later attempted to explain that Juror 016 was "single, no ties," presumably indicating that she was not married and possibly had no children. However, as we have already explained, *Batson* is clear that the prosecutor's proffered justifications must be reasonably "related to the particular case to be tried." 476 U.S. at 98; *see also Bishop*, 959 F.2d at 825 (stating that a prosecutor's reason for dismissing a potential juror must have some nexus to her "possible approach to specific trial"). The trial court record fails to establish how Juror 016's marital or parental status would have had any bearing on her ability to serve as a juror in a case involving prosecution for crack cocaine possession, and the prosecutor failed to offer any such explanation. Further, the record shows that the prosecutor did not strike Juror 015, a white juror who possessed the same objective characteristics as Juror 016: both were single, employed females with no children who responded to the court's questions in the same manner, thereby revealing the pretextual nature of this justification.[10] *See United States v.*

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10. The prosecutor attempted to prove the race-neutral character of this justification by comparing Juror 016 with Juror



*Alanis*, 335 F.3d 965, 969 (9th Cir. 2003) ("Peremptory challenges cannot be lawfully exercised against potential

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006, a white male, noting "[s]he and Mr. 006 were both single, no ties," *See Turner v. Marshall*, 121 F.3d 1248, 1251-52 (9th Cir. 1997) ("A comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination."). The record reveals, however, that Jurors 016 and 006 had very different backgrounds and thus did not possess "comparable characteristics" for purposes of the cross-racial analysis discussed in *Turner*, Juror 006, like Juror 016 was single, but, in contrast to Juror 016, Juror 006 had never been employed and, significantly, had an uncle who was a recovered alcoholic. This evidence is inconsistent with the prosecutor's assertion that there was a white juror with comparable characteristics who was dismissed for being single with no children. *Compare Burks v. Borg*, 27 F.3d 1424, 1429 (9th Cir. 1994) (holding that counsel may treat minority and nonminority jurors differently when there are subjective differences between them, although that party cannot insulate an explanation from appellate review simply by couching it in "vague and subjective terms") *with Turner*, 121 F.3d at 1251-52 (perceiving no basis to distinguish a challenged and unchallenged juror and holding that their similarity provided evidence of pretext); *cf. United States v. Lewis*, 837 F.2d 415, 417 & n.5 (9th Cir. 1988) (concluding that there was no evidence of pretext when the decision to strike the juror turned on "the interplay of various factors" identified by the prosecutor and "no unchallenged juror possessed all the cited characteristics").

We further note that, contrary to the suggestion made by the dissent, because Jurors 006 and 016 did not possess comparable characteristics, the comparison between the two did not provide a potential reason for the trial court to conclude that the prosecutor was credible.

jurors of one gender unless potential jurors of another gender with comparable characteristics are also challenged."); *Lewis*, 321 F.3d at 832-33 ("[A] comparative analysis of D.F. with empaneled jurors reveals that a finding of pretext was warranted."); *McCain*, 217 F.3d at 1221-22 (holding that where a non-black juror with no prior jury experience was empaneled, the proffered reason for striking a black juror for lack of jury experience was not genuine and therefore was pretextual); *cf. Miller-El*, 537 U.S. 322, 123 S. Ct. at 1043 (noting the fact that "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged" showed that the strikes "might have been selective and based on racial considerations").

**[7]** The prosecutor also claimed that Juror 016's youth was "important" because of her "lack of ties in the community," stating, "I think I tied that into a lack of ties in the community with both [Juror 016 and Juror 019]; that was one factor that I considered, that is, the manner in which I stated that they could–that their youth was important." Not only is the prosecutor's statement that Juror 016 had a "lack of ties in the community" not sufficiently "clear and reasonably specific," *Batson*, 476 U.S. at 98 n.20, but it is also not supported by the record and does not appear to have any relation to Juror 016's ability to serve as a juror in a criminal trial involving possession of crack cocaine. *See id.* at 88 (holding that the prosecutor's exercise of peremptory challenges must be "related to his view concerning the outcome") (internal quotation marks omitted); *McCain*, 217 F.3d at 1223 (stating that where the prosecutor did not explain the significance of a juror's body language, the prosecutor's claim that he struck that juror "on the sole basis that she had her elbow on the chair is patently frivolous," especially where no other evidence in the record indicated any possible bias).



**[8]** In sum, there was clear and convincing evidence that the prosecutor's stated concern over Juror 016's youthful age was a pretext for discrimination, evidence that the state appellate court did not address in unreasonably concluding that the prosecutor had dismissed Juror 016 on the basis of her age. This evidence supports Collins' claim that the prosecutor struck Juror 016 because of her race, and also demonstrates that the state appellate court was unreasonable when it determined that the trial court did not err by determining that Collins had failed to prove purposeful discrimination. However, because the appellate court offered Juror 016's demeanor as an alternative explanation, we must assess whether the court unreasonably determined that the trial court had properly accepted that justification as nondiscriminatory before determining the ultimate significance of the appellate court's conclusion regarding Juror 016's age.

### 2. Demeanor

The state court of appeal also concluded that even if the prosecutor's reliance on Juror 016's youthful age had been improper, the "prosecutor reasonably could have interpreted prospective [Juror 016's] body language as indicative of hostility or disrespect" and properly dismissed her on that basis. Although the trial court did not witness Juror 016's alleged offensive conduct, the appellate court determined there was "*nothing* in the present record" indicating that the trial court should not have given the prosecutor the benefit of the doubt or that it had failed to evaluate whether the prosecutors' justifications should have been accepted.

As the record reflects, the state appellate court reasonably determined that the trial court had not observed Juror 016's demeanor but nonetheless accepted this alternate reason for striking Juror 016 on the basis of the prosecutor's credibility. Because the trial court did not observe Juror

016's demeanor, the critical question here is whether the appellate court's determination that the trial court properly credited the prosecutor's representation was unreasonable.[11/] Notably, the basis for the state appellate court's determination was its conclusion that there was "nothing in the present record" to indicate that the trial court did not conduct a searching inquiry in giving the prosecutor the benefit of the doubt or should have questioned the prosecutor's credibility. We conclude that this determination was unreasonable determination of the facts because the prosecutor failed to offer any credible justification for striking Juror 016 and 019.

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11. In response to the prosecutor's characterization of Juror 016's alleged conduct, the trial court responded: "the court, frankly, did not observe the demeanor of Ms. 016 that was complained of by the district attorney." In light of the trial court's statement and the fact that there is nothing in the trial transcript (except the prosecutor's representation) which indicates that Juror 016 answered any question by stating "uh-huh" or that she had rolled her eyes or turned away, the appellate court reasonably determined that the trial court had accepted the prosecutor's statements about Juror 016's demeanor as true. Its corresponding conclusion–that a peremptory challenge exercised on the basis of a juror's body language would not be improper–was also reasonable. *See Burks*, 27 F.3d at 1429 & n.3 (noting that trial counsel's evaluation of a potential juror's demeanor, tone, and facial expressions may lead to a "hunch" or "suspicion" that the juror might be biased, and that a peremptory challenge based on this reason would be legitimate); *United States v. Power*, 881 F.2d 733, 740v (9th Cir. 1989) (accepting as legitimate the government's explanation that a juror's "fidgeting and looking around as he sat in the jury box . . . made the prosecutor believe that the individual would not be an attentive juror").



First, we note that the prosecutor consistently identified Jurors 016 and 019 as "both young."[12/] However, the record reveals that Juror 019 was at least a middle-aged grandmother. Indeed, Juror 019 informed the court that she was a retired nurse with seven grown children, the youngest of which had five children of her own. A prosecutor supplied with this information could not credibly identify Juror 019 as young. This incorrect factual statement supports Collins' argument that the prosecutor was not credible. *See McCain*, 217 F.3d at 1222 (holding that reasons for excusing black jurors that were objectively contradicted by the record provided evidence of purposeful discrimination); *Caldwell v. Mahoney*, 159 F.3d 639, 651 (1st Cir. 1998) (holding that serious questions of pretext arise when the facts in the record are "objectively contrary to" the prosecutor's proffered justifications).

In addition, the trial court judge rejected the prosecutor's justification for striking Jurors 016 and 019 on the basis of gender. This too supports the argument that the prosecutor

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12. Although Collins does not challenge the prosecutor's strike against Juror 019, this strike is relevant to Collins' *Batson* challenge. *See Hernandez*, 500 U.S. at 363 (holding that a prosecutor's motive "may often be inferred from the totality of relevant facts") (internal quotation marks omitted); *Purkett* , 514 U.S. at 768-69 (holding that at step three, the trial court must evaluate the persuasiveness of the prosecutor's justification); *Batson*, 476 U.S. at 98 (holding that the trial court must decide whether the prosecutor's explanation for the strike is pretextual); *United States v. Hill*, 146 F.3d 337, 342 (6th Cir. 1998) (noting that the trial court "has the responsibility to assess the prosecutor's credibility under all of the pertinent circumstances, and then to weigh the asserted justification against the strength of the defendant's prima facie case under the totality of the circumstances:).

dismissed Juror 016 on the basis of her race.[13] *See Lewis*, 321 F.3d at 834 (stating that the fact that the trial court had found some of the prosecutor's arguments unconvincing "does not support the prosecutor's credibility; it undermines it"). Further, the fact that the prosecutor attempted to offer a facially discriminatory justification for dismissing the only black female jurors in the venire, and then quickly abandoned this justification when informed by the trial judge that it was improper, is another indication that the prosecutor's stated justifications were a pretext for discrimination. *Miller-El*, 537 U.S. 322, 123 S. Ct. at 1040 ("Credibility can be measured by, among other factors, the prosecutor's demeanor, by how reasonable, or how improbable, the explanations are.").

Finally, although the trial court credited the prosecutor as excusing Juror 019 for a race-neutral reason because she had a daughter who had completed rehabilitation for cocaine addiction, the record demonstrates that another white juror, Juror 030, whose son recovered from a cocaine addiction—a highly comparable situation—was not dismissed by the prosecutor. Because "[p]eremptory challenges cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged," *McCain*, 217 F.3d at 1221, the prosecutor's dismissal of Juror 019 provides further evidence of the prosecutor's discriminatory intent. *See Hernandez*, 500 U.S. at 363 (stating that a prosecutor's motive may be inferred from the totality of relevant facts);

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13. In rejecting the prosecutor's initial references to gender, the trial court explained: "I recall the United States Supreme Court saying the use of peremptory challenges based on gender is improper. I don't see . . . that you are seeking to justify excusing people of one ethnicity based on their gender. I don't think that is going to cut it."



*Riley v. Taylor*, 277 F.3d 261, 283 (3d Cir. 2001) ("The relative plausibility or implausibility of each explanation for a particular challenge may strengthen or weaken the assessment of the prosecution's explanation as to other challenges.") (internal quotation and alteration marks omitted).

The prosecutor's objectively unreasonable statements regarding Juror 019's age, her pretextual justifications for dismissing Juror 019, and her attempt to use gender as a race-neutral basis for excluding Jurors 016 and 019, combined with her pretextual justifications for dismissing Juror 016 on the basis of her alleged lack of community ties, her marital status, and her purported tolerance, and the fact that nothing in the record corroborated her allegations regarding Juror 016's demeanor, provide "clear and convincing evidence" that the prosecutor did not dismiss Juror 016 on the basis of her demeanor. In light of the evidence in the record, the appellate court's determination that the prosecutor dismissed Juror 016 because of her demeanor was an unreasonable determination of the facts. Because this determination provided the basis for the appellate court's conclusion that the trial court had not clearly erred in accepting the prosecutor's justification as race-neutral, this determination also was objectively unreasonable, *See Johnson*, 3F.3d at 1331 ("When there is reason to believe that there is a racial motivation for the challenge" we are not "bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it."); *Lewis*, 321 F.3d at 833-34 (holding that where justification for strike was not corroborated by the record and the prosecutor was not credible, the proffered justification could not support state court's conclusion that petitioner had failed to prove purposeful discrimination).

C.

The state court of appeal held that Collins had failed to establish purposeful discrimination on the basis of its objectively unreasonable determination that the prosecutor properly dismissed Juror 016 because of her age. The appellate court's alternative ruling–that the trial court properly credited the prosecutor's assertion that Juror 016 had rolled her eyes and turned away from the court when asked a question during voir dire, and that her dismissal based on Juror 016's demeanor did not proved any evidence of purposeful discrimination–is also unsupported by the record. Thus, clear and convincing evidence demonstrates that there was no credible basis for dismissing Juror 016 on the basis of her age of demeanor.

**[9]** there is, however, substantial evidence supporting Collins' contention that the prosecutor dismissed Juror 016 because of her race–evidence that the appellate court failed to address. The trial record demonstrates that the prosecutor's justifications for dismissing Juror 016 on the basis of her age were contrary to the record (likely tolerance of drug offenders), were unrelated to her ability to serve as a juror in Collins' case (lack of community ties), and were not applied equally to white jurors (single with no children). The record also shows that one of her justifications was patently discriminatory (gender), while one of her justifications for dismissing Juror 019 was contrary to the record (age). In sum, the record demonstrates that the prosecutor's proffered reasons for dismissing Juror 016 were wholly implausible, unpersuasive, and a pretext for discrimination on the basis of her race.[14/]

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14. The fact that a black man and "a female juror that [was] of African-American color, black color" remained in the venire does not alter our conclusion. *See Turner*, 121 F.3d at 1254 ("[A]lthough the fact that the prosecutor accepted four African-Americans on the jury may be considered indicative of a nondiscriminatory motive, [] it is not dispositive."); *Palmer v. Estelle* but may not rely solely on, the existence of Blacks on a jury when determining whether a prosecutor has violated *Batson*.")



In order to secure habeas relief, however, Collins "must demonstrate that [the] state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was 'objectively unreasonable' in light of the record before the court." *Miller-El*, 537 U.S. 322, 123 S. Ct. at 1045. We conclude that Collins has met this heavy burden.

1.

**[10]** The facts underlying the appellate court's conclusion, namely that the trial court properly accepted the prosecutor's justification that Juror 016 was young and had exhibited an improper demeanor, are unsupported by the record. Collins' claim of pretext, however, is supported by the record–the record contains clear and convincing evidence that the prosecutor's reasons for striking Jurors 016 and 019 were pretextual. Thus, not only were the state appellate court's factual determinations not supported by the record, but the record also demonstrates that the appellate court's ultimate conclusion that the trial court did not err in finding that Collins failed to establish purposeful discrimination was objectively unreasonable. The fact that the appellate court failed to address all the evidence relating to the prosecutor's justification for striking Juror 016 and indeed disregarded this evidence by stating that "nothing in the present record . . . indicates the trial court did not approach its task appropriately" highlights the objective unreasonableness of

its assessment of the record. Collins has thus shown by "clear and convincing evidence" that the state appellate court's determination, that the prosecutor did not purposefully discriminate on the basis of race in striking Juror 016, "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2).[15/]

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15. Contrary to the assertion in the dissent, we have not substituted our own judgment for that of the state court. "Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court *can disagree* with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Miller-El*, 123 S. Ct. at 1041; *see also Hall v. Dir. of Corrs*, 343 F.3d 976, 984 n.8 (9th Cir. 2003) ("AEDPA, although emphasizing proper and due deference to the state court's findings, did not eliminate federal habeas review. Where there are real, credible doubts about the veracity of essential evidence and the person who created it, AEDPA does not require us to turn a blind eye.") Critical to our analysis are the ten different reasons offered by the prosecutor for dismissing Jurors 016 and 019. As our analysis reflects, one of the reasons was facially discriminatory, two reasons were contradicted by the record, one reason was not applied to a comparably similar juror who was not struck, and four reasons were without any support in the record.



**2.**

Further, although the appellate court identified the three-step inquiry for identifying purposeful discrimination under *Batson*, it unreasonably applied *Batson*'s third prong in determining that the trial court had fulfilled its *duty* to determine whether Collins had established purposeful discrimination. *See Andrade*, 123 S. Ct. at 1174 (citing *Williams v. Taylor*, 529 U.S. 362 (2000)). It is well-established that "once the prosecutor offers a race-neutral basis for his exercise of peremptory challenges, the trial court then has the *duty to determine if the defendant has established purposeful discrimination.*" Hernandez, 500 U.S. at 363 (emphasis added) (internal quotation marks omitted); *id.* at 359 (holding that the "trial court *must* determined whether the defendant has carried his burden of proving purposeful discrimination") (emphasis added); *Batson*, 476 U.S. at 98 ("The trial court will then have the *duty* to determine if the defendant has established purposeful discrimination.") (emphasis added). As the Supreme Court has emphasized, "[i]n deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available,'" *Batson*, 476 U.S. at 93 (quoting *Arlington Heights*, 429 U.S. at 266), and must evaluate the "genuineness of the [prosecutor's] motive," *Purkett*, 514 U.S. at 769. Thus, a state appellate court's decision that overlooked a trial court's failure to evaluate the persuasiveness of the prosecutor's justifications in conducting this inquiry would rest on an unreasonable application of well-established Supreme Court precedent. *See Lewis*, 321 F.3d at 832 ("Unlike the trial court, a court of appeal is not in an ideal position to conduct a step three evaluation. It can, however, use the trial court's findings and the evidence on the record to evaluate the support on the record for the prosecutor's reasons and credibility, and to compare the struck and empaneled jurors.")

Here, the appellate court's determination that "nothing in the present record" indicated that the trial court failed to evaluate the prosecutor's credibility must have been based either (1) upon a conclusion that there was no evidence that undermined her credibility or (2) upon a belief that the record demonstrated that the trial court had assessed any such evidence in evaluating the persuasiveness of the prosecutor's justification. The record belies either conclusion.

**[11]** As we have discussed, the prosecutor's attempt to justify her challenge of Juror 016 on the basis of her age, specifically on account of her marital status, her alleged lack of community ties, and her purported tolerance, was unsupported by the record. In addition, the prosecutor's attempt to justify her strike of Juror 019 on the basis of her youthful age was contradicted by the record, while her justification based on Juror 019's daughter's past cocaine addiction was pretextual given that a white juror (Juror 030) with comparably similar characteristics was permitted to serve on the jury. The trial court acknowledged that it had not observed Juror 016's alleged demeanor, and nothing in the record corroborates the prosecutor's allegations. It also rejected the prosecutor's justifications relating to gender as clearly violative of the Fourteenth Amendment. Thus, contrary to the appellate court's assessment of the record, the trial court did not fulfill its duty by determining that Collins had failed to prove purposeful discrimination when the prosecutor failed to offer any credible justification for striking Juror 016 and 019. The appellate court's contrary determination demonstrates that, although it recognized the trial court's duty under *Batson* to determine whether Collins had show purposeful discrimination, it unreasonably applied that principle in concluding that the trial court had done so.



## IV.

**[12]** Because the basis for the appellate court's decision was its unreasonable determination of the facts in light of the evidence presented at the trial, and because it also unreasonably applied clearly established federal law as determined by the Supreme Court, we conclude that the state trial appellate court committed constitutional error that warrants the grant of a writ of habeas corpus under section 2254. We therefore reverse the district court's judgment and remand with instructions to grant the petition on conditions it deems appropriate.[16]

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16. In light of our disposition, we need not address Collins' 8th Amendment argument that his three strikes sentence was cruel and unusual. *But see Andrade*, 123 S. Ct. 1166.

**REVERSED and REMANDED.**

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**HALL**, Circuit Judges, dissenting:

The state trial court determined that the prosecutor's proffered race-neutral justifications for striking Juror 016 were credible. This conclusion is entitled to "great deference," *Hernandez v. New York*, 500 U.S. 352, 364 (1991), and may not be disturbed on appeal unless clearly erroneous. *Id.* at 369; *see also Miller-El v. Cockrell*, 123 S. Ct. 1029, 1041 (2003) (reasoning that because an appellate court has access only to the trial transcript, it is "not as well positioned as the trial court is to make credibility determinations."). Applying this deferential standard, the California Court of Appeal found that the trial court did not err. Because this case is governed by AEDPA, we must defer to the California Court of Appeal's conclusion unless contrary to, or an unreasonable application of, clearly established Supreme Court precedent, or premised on an unreasonable factual finding. 28 U.S.C. § 2254(d).

The majority does not defer to the California Court of Appeal. According to the majority, deference is unwarranted because the Court of Appeal's decision rests upon the "unreasonable factual determination" that "there was 'nothing in the present record' to indicated that the trial court did not conduct a searching inquiry in giving the prosecutor the benefit of the doubt or should have questioned the

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prosecutor's credibility." In point of fact, the Court of Appeal held only that the trial court's *ultimate* decision to credit the prosecutor was not clearly erroneous, thereby adhering to the well-established principle that "where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Hernandez*, 500 U.S. at 369.

Having manufactured a reason to disregard the California Court of Appeal's decision, the majority essentially reviews the issue of the prosecutor's credibility *de novo*, concluding that the writ should issue because, under the majority's view, "the record belies" the conclusion that the trial court assessed evidence which ostensibly undermined the prosecutor's credibility. In doing do, the majority disregards the canonical rule that evaluation of a prosecutor's credibility "lies peculiarly within a trial judge's province," and is entitled to "great deference." *Id.* at 366[1]

Viewing the record in its entirety, I am firmly convinced that the California Court of Appeal's decision was reasonable. I respectfully dissent.

* * * *

The majority identifies four consideration potentially relevant to the prosecutor's credibility. In order to reject the California Court of Appeal's decision, we would have to

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1. Contrary to the majority's view, the state appellate court has no duty to make its own purposeful discrimination determination. Indeed, this would beyond the scope of the state appellate court's review. In the *Batson* context, a state appellate court's duty is limited to determining whether the *trial court's* purposeful discrimination finding was *clearly erroneous*. *E.g.*, *Hernandez*, 500 U.S. at 366-67.

conclude that the Court of Appeal *unreasonably* determined that, given these four considerations, the trial court did not *clearly err* by crediting the prosecutor's race-neutral explanation. As the following discussion illustrates, the majority falls far short of making this requisite demonstration.

The majority argues that the trial court should have questioned the prosecutor's credibility because she referred to *another* prospective juror, Juror 019, as "young" even though Juror 019 was a grandmother of five. As the majority suggests, the prosecutor may have either been entirely incapable of judging a person's age or may have intentionally misrepresented Juror 019's age to the court. A fair more plausible explanation, on the other hand, is that the reference to Juror 019 as "young" was purely accidental. The statement at issue occurred during a discussion about Juror 016, Juror 019, and Juror 006, a young ,single white male against whom the prosecutor also exercised a peremptory strike. Because Jurors 016 and 019 were the subject of the *Batson* challenge, both jurors were repeatedly referred to in tandem. Similarly, Jurors 016 and 0066 were referred to together several times by the prosecutor, who argued that the two young, single jurors were similarly situated. In this context, it is not surprising that the prosecutor would, on one occasion, flip the designations "006" and "019." Indeed, defense counsel also seemed confused about the numerical designations, once mistakenly referring to Juror 016 as "Ms. 019."[2/] Both the trial judge and defense counsel clearly indicated that they understood the prosecutor's justification for striking Juror

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2. After noting that one of the prosecutor's justifications for striking *Juror 016* was a lack of information, defense counsel argued, "if [the prosecutor] wanted more information, she could have asked the court to ask more questions of *Ms. 019*."



019 to be her daughter's drug problem, and the prosecutor's justification for striking Juror 016 to be that, like Juror 006, she was young, single, and potentially tolerant.[3/] Under these circumstances, the majority's focus on the prosecutor's misstatement,[4/] an issue that was not briefed by the parties, is nothing short of absurd.

The majority also argues that the trial judge should have questioned the prosecutor's credibility because the prosecutor cited a desire to have "more male-female balance" in the jury as a race-neutral basis for excluding Juror 016. The majority places undue emphasis on the prosecutor's arguably improper reference to gender. The prosecutor cited a variety of other race-neutral justifications, including Juror 016 demeanor, youth, marital status, and possible tolerance. There is no indication in Supreme Court precedent, or in cases from our circuit for that matter, that a trial judge's decision to reject *one* of the prosecutor's race-neutral justifications compels the trial judge to reject *all* of the other race-neutral justifications offered by that prosecutor.[5/] In the instant case, the trial judge

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3. Summarizing the prosecution's argument, defense counsel stated: "[The prosecutor] has compared Ms. 016 to Mr. 006, which she excused by saying they were both young. . . . And Ms. 019, certainly, indeed, said that she had . . . one daughter which she said a cocaine problem and that she had been involved with treatment for the daughter."

4. Indeed, the prosecutor's "incorrect factual statement" is the majority's lead argument in support of its conclusion that the trial court clearly erred in considering the prosecutor to be credible.

5. The majority quotes this court's decision in *Johnson v. Vasquez*, 3F.3d 1327 (9th Cir. 1993), for the proposition that "'[w]hen there is reason to believe that there is a racial motivation of the challenge,' we are not 'bound to accept at face

rejected the prosecutor's gender-balance justification, but nonetheless chose to credit the prosecutor's other race-neutral justifications for the challenge. The majority highlights nothing in the record to indicate that the California Court of

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value a list of neutral reasons that are either unsupported in the record or refuted by it.'" *Id.* at 1331. This reference is misleading, however, First of all, the *Johnson* court was confronted with a case in which the prosecutor's own statements "strongly suggest[ed] that [he] responded to defense counsel's alleged exclusions of other minority venire members by excluding a member of defendant's race." *Id.* at 1330. Hence, this court's admonition that "when there is reason to believe that there is a racial motivation for the challenge . . . we are not bound" was a direct reference to the prosecutor's tacit admission that he was excluding members of the venire based on their ethnicity, an integral element of the *Johnson* decision which is not present in the instant case.

Second, the majority omits crucial language from the *Johnson* decision which bears on its relevance to the case at bar. Specifically, we noted that "*neither the trial courts nor we* are bound to accept" the prosecutor's ostensibly neutral rationales at face value. *Id.* at 1331 (emphasis added). Viewed in context, the language from our *Johnson* decision clarifies the majority's fundamental mistake in this case. Once the trial court decides to "accept at face value" a "list of neutral reasons" proffered by the prosecutor, we are bound by precedent to grant that decision "great deference." *Hernandez*, 500 U.S. at 366

Finally, even if the language from *Johnson* were pertinent to the instant case, it nonetheless fails to dispute the point that, even if a trial or appellate court chose not to accept *one* (or more) of the prosecutor's articulated justifications, they would not thereby be compelled to reject *all* of the proffered rationales.



Appeal should have deemed this decision *clearly erroneous*.

The third credibility issue raised by the majority also relates to Juror 019 rather than Juror 016. Making an argument not presented by Collins either before this court or before the California Court of Appeal, the majority contends that the prosecution's explanation that Juror 019 had a daughter recently treated for cocaine addition was pretextual because a white juror passed by the prosecution, Juror 030, also had a child with a cocaine problem. There are several fundamental problems with the majority's analysis of this issue. The issue was not briefed by the parties or discussed at oral argument, and the record itself certainly does not contain clear and convincing evidence that Juror 019 and Juror 030 were, as the majority terms them, "indistinguishably similar."[6/] Moreover, even if one accepts the majority's shaky premise that Jurors 019 and 030 were "indistinguishably similar," there is no Supreme Court

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6. For example, Juror 019's daughter's cocaine problem were more recent (two years) than was Juror 030's son's problem (six years). There may also have been significant differences in the demeanor of each prospective juror that are not evident from the trial transcript.

By way of contrast, compare the majority's conclusion that Juror 019 and 030 are indistinguishable to its own discussion of the dissimilarity of Jurors 006 and 016, which is relegated to a footnote. In support of its claim that the prosecutor's alleged rationales for dismissing Juror 016 (her marital status and lack of community ties) were pretextual, even though Juror 006 was also dismissed on the same grounds, the majority summarily concludes that "[t]he record reveals . . . that Jurors 006 and 016 had very different backgrounds and thus did not possess 'comparable characteristics,'" even though Jurors 006 and 016 "were both single, no ties."

precedent indicating that a race-neutral justification is necessarily pretextually merely because it applies to another member of the venire. Similarly, there is a complete dearth of Supreme Court precedent indicating that a trial judge may not credit a prosecutor's race-neutral justification if there is reason to believe that the race-neutral justification given for *another* juror was pretextual. For these reasons, the prosecutor's conduct vis-avis Juror 019 lends very little, if any, support to the majority's conclusion that the trial judge should have questioned the prosecutor's explanation for striking Juror 016.

Finally, the majority contends that the prosecutor's explanation that Juror 016 was a youthful single person, and therefore potentially too tolerant, was not credible. Noting that Juror 016 "believed possession of crack cocaine should be illegal," the majority concludes that the prosecutor's concern that Juror 016 might be too tolerant for this three strikes case was "patently frivolous." The majority's conclusion is simply untenable — the theory that young persons, even those who believe crack cocaine should be illegal and don't expressly indicate any heightened tolerance for drug offenders, may be less willing to impose harsh sentences for drug possession than their older counterparts in the venire can hardly be considered unreasonable, much less "implausible or fantastic."

Indeed, the majority's own analysis demonstrates precisely why the Court of Appeal properly deferred to the trial court's judgment. The majority strains to find that the credibility issues discussed above constitute "clear and convincing" evidence which not only undermines the prosecutor's credibility, but makes clear that the prosecutor's articulated rationales for her peremptories were "wholly implausible." Viewing the majority's credibility argument generously, however, their conclusion is merely that the trial court had several potential reasons to question the



prosecutor's credibility. Presumably, the trial court also had a variety of potential reasons to believe that the prosecutor *was* credible, including the prosecutor's ostensibly truthful comparison between Juror 016 and Juror 006. Significantly, the trial judge also had the ability to observe the prosecutor's demeanor to determine whether she appeared to be telling the truth, evidence which would not be evident in the record. Both the majority opinion and the record are devoid of any basis for concluding that the prosecutor's statements and demeanor left the trial judge with *no permissible alternative* but to reject the prosecutor's race-neutral justifications. *See Hernandez*, 500 U.S. at 369 ("Where there are two permissible views of the evidence, the fact-finder's choice between the cannot be clearly erroneous." *See also Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (stating that Section 2254 "demands that state court decisions be given the benefit of the doubt").

For the forgoing reasons, I would affirm.

# APPENDIX C

**NOT FOR PUBLICATION**

FILED

**APR 29 200**

**CATHY A. CATTERSON, CLERK**
**U.S COURT OF APPEALS**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

| | |
|---|---|
| STEVEN MARTELL COLLINS,<br><br>Petitioner - Appellant,<br>*v.*<br><br>BERTRAM RICE; et al.,<br><br>Respondents-Appellees. | No. 01-56958<br><br>No. CV-98-09329-THJ<br>Central District of California<br>Los Angeles<br><br>**ORDER** |

Before: **PAEZ,** Circuit Judge.

Respondents-appellees' Motion for Stay of Mandate is **GRANTED**. The mandate shall be stayed for ninety days.

# APPENDIX D

LODGED
CLERK, U.S. DISTRICT COURT
JUL 12 2001
CENTRAL DISTRICT OF CALIFORNIA
BY Mc DEPUTY

FILED
CLERK, US DISTRICT
AUG 31 2001
CENTRAL DISTRICT COURT
BY Mc DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

| | |
|---|---|
| STEVEN MARTELL COLLINS, Petitioner, v. BERTRAM RICE, Warden, Respondent. | Case No. CV 98-9329 TJH (AN) ORDER APPROVING AND ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE |

Pursuant to 28 U.S.C. § 636, the Court has review the file, including the Magistrate Judge's Report and Recommendation, *de novo*.

IT ORDERED:

1. The Report and Recommendation is approved and adopted.

2. Judgment shall be entered dismissing the Petition with prejudice.

IT IS FURTHER ORDERED that the clerk shall serve a copy of this Order and the Judgment on all counsel or parties of record.

ENTER ON ICMS

DATED: 8/28/04, 2001 / s /

AUG 31 2001 TERRY J. HATTER, JR.

CHIEF UNITED STATES

DISTRICT JUDGE

# APPENDIX E

ENTERED
AUG 31 2001
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SANTA ANA OFFICE
BY \S\ DEPUTY

ENTER/JS-7
PRIORITY SEND
FILED
CLERK, U.S. DISTRICT COURT
AUG 31 2001
CENTRAL DISTRICT CALIFORNIA
MC DEPUTY

LODGED
CLERK, U.S. DISTRICT COURT DISTRICT
JUL 12 2001
CENTRAL DISTRICT OF CALIFORNIA
BY MC DEPUTY

**THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)**

UNITED DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

STEVEN MARTELL COLLINS, ) Case No. CV 98-9329 TJH (AN)
)
Petitioner, )
)
v. ) JUDGMENT
)
BERTRAM RICE, Warden, )
)
Respondent. )
)

IT IS HEREBY ADJUDGE that this action is

dismissed with prejudice for the reasons set forth in the related Magistrate Judge's Report and Recommendation.

DATED: 8/28/01, 2001

HATTER / S /
TERRY J. HATTER, JR.

**ENTER ON ICMS**
AUG 31 2001

# APPENDIX F

Filed
Clerk, U.S. District Court
JUL 12 2001
CENTRAL DISTRICT OF CALIFORNIA
BY MC DEPUTY

UNITED DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

| | |
|---|---|
| STEVEN MARTELL COLLINS, Petitioner, v. BERTRAM RICE, Warden, Respondent. | Case No. CV 98-9329 TJH (AN) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE |

This Report and Recommendation is submitted to the Honorable Terry J. Hatter, Jr., Chief United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons set forth below, the Magistrate Judge recommends that the Court deny the Petition for Writ of Habeas Corpus and dismiss this action with prejudice.

## I. Proceedings

On August 29, 1996, a Los Angeles County jury found petitioner guilty of possession of a controlled substance in violation of Health and Safety Code § 11350(a). [Clerk's Transcript ("CT") at 108, 112.] The jury also found truce the allegations that petitioner had two prior serious felony

convictions within the meaning of California Penal Code §§ 667(b) - (i) & 1170.12(a) - (d) (California's "Three Strikes Law"), and that he served three prior prison terms within the meaning of Penal Code §§ 667.5(b) & 1203(e)(4). [CT at 109-10, 112.] The court struck sentence enhancements for petitioner's prior prison terms, and petitioner was sentenced to twenty-five years to life imprisonment. [CT at 120-22.]

Petitioner appealed to the California Court of Appeal, which affirmed the judgment. [Return Exs. A; B at 105.] Petitioner then filed a Petition for Review with California Supreme Court, which denied the petition without comment or citation on February 18, 1998. [Return Exs. C; D.] Petitioner thereafter filed a Petition for Writ of Habeas Corpus with the California Supreme Court. [Return Ex. E.] The court denied the petition on June 24, 1998. [Return Ex. F.]

On November 19, 1998, petitioner initiated this action by filing with the Court a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254. On January 11, 1999, he filed a First Amended Petition, followed by a Second Amended Petition on January 29, 1999, which raised three grounds for relief. On April 6, 1999, respondent filed a Motion to Dismiss the Second Amended Petition, arguing that petitioner's third claim - that the trial court's failure to strike a prior felony conviction violated petitioner's Fourteenth Amendment rights - was unexhausted. [Mot. to Dismiss at 3-8.] Petitioner subsequently elected to strike his third claim, and the Court approved the voluntary dismissal on June 14, 1999. [Resp. to Min. Order dated May 11, 1999, at 2; Min. Order dated June 14, 1999.] Respondent filed a Return to the Second Amended Petition on September 13, 1999, contending that petitioner's two remaining grounds for relief fail on the merits. Petitioner filed a Traverse on February 24, 2000.



## II. Petitioner's Contentions

Petitioner raises two grounds for relief. Petitioner argues that the sentence of 25 years to life violates his Eighth Amendment right against cruel and unusual punishment. [Second Amended Petition at 6.] Petitioner also argues that the trial court improperly denied his Wheeler motion, which objected to the prosecutor's peremptory challenge against a prospective African-American juror. [Id.]

## III. Discussion

### A. Standard of Review

The current standard of federal habeas review dictates that federal courts must defer to state court decisions which previously addressed pending habeas claims on the merits, unless the state court proceeding:

> 1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> 2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceedings.

28 U.S.C. § 2254(d).

A state court decision is "contrary to" clearly established federal law if the state court applies a rule that contradicts the governing law set forth by the Supreme Court, or if the state court confronts a set of facts that are materially indistinguishable from those in a Supreme Court decision and nevertheless arrives at a different result. Williams v. Taylor, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court decision involves an "unreasonable application of" clearly established federal law if the state court identifies the correct governing legal principle from the

decisions of the Supreme Court but unreasonably applies that principle to the facts of the case, Id. at 407-408.

However, to find an unreasonable application of federal law, a federal habeas court may not conclude merely that the petitioner has the better of two reasonable legal arguments. Van Tran v. Lindsey, 212 F.3d 1143, 1153-54 (9th Cir.), *cert. denied,* 121 S.Ct. 340, 148 L.Ed. 2d 274 (2000). Rather, the reviewing court must find that "clear error" occurred. That is, the reviewing court must be left with a firm conviction that one answer, the one rejected by the state court was correct and the other, the application of federal law that the state court adopted, was erroneous. Id.

This standard of review applies to claims that are adjudicated on the merits in a state court proceeding. In the present case, the California Supreme Court denied petitioner's Petition for Review. Although this denial was without explanation or comment, such summary denial is a denial on the merits. Hunter v. Aispuro, 982 F.2d 344, 348 (9th Cir. 1992), *cert. denied,* 510 U.S. 887, 114 S.Ct. 240, 125 L.Ed. 2d 194 (1993). When a higher court issues a summary denial, the last reasoned state court decision can be assumed to form the basis of the higher court's denial. Y1st v. Nunnemaker, 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). Here, the Court of Appeal opinion, which expressly rejected petitioner's claims on the merits, satisfies the requirement of adjudication on the merits. Therefore, this Court must apply 28 U.S.C. § 2254(d)'s deferential standard of review to this case.

**B. Cruel and Unusual Punishment**

In his Eighth Amendment claim, petitioner contends that his sentence of twenty-five years to life for a drug offense constitutes cruel and unusual punishment. [Second Amended Petition at 6.] Petitioner reasons that his current felony is



non-serious, that he does not pose a threat to society, and that his prior felony convictions, which arose from a single episode, are remote in time. [Id. at 28-32.] He further argues that his sentence is as harsh as, if not harsher than, sentences imposed for more serious felonies such as rape, murder, and robbery. [Id. at 32-33.] Petitioner also contends that his crime of drug possession warrants shorter penalties in other jurisdictions. [Id. at 33-36.] As such, petitioner believes his sentence is grossly disproportionate. As discussed below, petitioner's claim lacks merit.

In rejecting petitioner's reasoning, the Court of Appeal held that "[a] severe punishment is merited herein based on Collins's prior serious or violent felonies convictions and his status as a repeat offender. In light of Collins's individual circumstances and criminal history, the term is not grossly disproportionate. . . ." [Return Ex. B at 104.] The court further concluded that petitioner's sentence does not constitute cruel and unusual punishment because it is not "'so disproportionate to the crime for which it is inflicted that it shocks the conscience nd offends fundamental notions of human dignity.'" [Id.]

""The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Harmelin v. Michigan, 501 U.S. 957, 1001, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Kennedy, J., joined by O'Connor and Souter, JJ., concurring). Outside the context of capital punishment, it is extremely difficult to establish that a particular sentence is grossly disproportionate. Rummel v. Estell, 445 U.S. 263, 272, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980). Non-death penalty sentences almost always are upheld against Eighth Amendment challenges, even where the offense is non-violent. Id.

Indeed, the Supreme Court has stated that "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative." Id. at 274. Thus, as long as a sentence of imprisonment for a non-capital felony does not exceed statutory limits, it usually will not be overturned on Eighth Amendment grounds. United States v. Zavala-Serra, 853 F.2d 1512, 1518 (9th Cir. 1988).

Here, petitioner was convicted of a non-capital offense, and his sentence fell within statutory limits prescribed by California Penal Code §§ 667(b) - (i) and 1170.12(a) - (d). Furthermore, petitioner is a multiple felony offender. He was convicted of robbery and forcible rape in 1982, and possession of a firearm by a felon in 1993. [CT at 58, 63.] Petitioner's current offense is a serious narcotics violation which took place within six months of petitioner being paroled. [Probation Report at 130.][1/] Petitioner is clearly a recidivist whose conduct is sanctionable under California's Three Strikes Law. CAL. PENAL CODE §§ 667(b) - (i), 1170.12(a) - (d). Eighth Amendment challenges to sentences based on recidivism statutes generally do not survive. Rummel, 445 U.S. at 268. A state has a valid interest "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." Id. at 276.

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1. Although this court's Order dated September 16, 1999, sealed pages 66-72 of the Reporter's Transcript as well as petitioner's Probation Report, the Order is hereby modified to allow limited reference to non-sensitive, non-identifying information.



Taken together, these factors weigh against a finding that petitioner's sentence is disproportionate. Petitioner's sentence of twenty-five years to life is not cruel or unusual in light of the seriousness of his current offense and his prior criminal conduct. Accordingly, the decision of the state court was not contrary to or an unreasonable application of clearly established federal law, and petitioner's Eighth Amendment claim must fail.

**C. Trial Court Denial of Wheeler Motion**

During jury selection, petitioner made a motion pursuant to People v. Wheeler, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978), objecting to the prosecutor's peremptory challenge against a prospective African-American juror. [Reporter's Transcript ("RT") at 66.] In response to the motion, the judge ruled that petitioner had established a prima facie case of discrimination, and ask the prosecutor to justify her peremptory challenge. [Id. at 66, 68.] The prosecutor responded that her challenge was prompted by the juror's young age, and by an observation that the juror "rolled her eyes" during questioning. [Id. at 66-67.] Although the judge did not personally observe the juror's demeanor, the judge indicated that he was prepared to give the prosecutor "the benefit of the doubt," and that the prosecutor's concerns about the juror's age also justified the challenge. [Id. at 71-72.] The trial judge therefore denied petitioner's motion. [Id. at 72.]

Petitioner claims that the trial court erred by denying his Wheeler motion because the prosecutor's reasons were insufficient to overcome an inference of racial discrimination. [Second Amended Petition at 6, 25.] Petitioner contends that the juror's young age was not a valid reason for a peremptory challenge, since youths constitute a cognizable group which may not be discriminated against in jury selection. [Id. at 19-22.] Petitioner also argues that by giving the prosecutor the

"benefit of the doubt" as to the juror's demeanor, the trial judge failed to make a "sincere and reasoned effort" to evaluate the credibility of the prosecutor's justifications. [Id. at 22-25.]

In rejecting petitioner's arguments, the Court of Appeal noted that "there is no case law to support the proposition the young are a cognizable class for the purposes of a Wheeler motion. Rather, numerous courts have expressly declined to recognize age as a factor that defines a cognizable group." [Return Ex. B at 101.] The court further opined that the trial court's findings were "entitled to great deference on appeal," and that "[a]bsent a showing by the defendant to the contrary, [the court] 'rel[ies] on the good judgment of the trial [court ]' to evaluate whether the prosecutor's reasons were bona fide." [Id. at 102-03.] Thus, the court concluded that the trial judge properly denied petitioner's Wheeler motion, and that petitioner was not denied a representative jury. [Id. at 103.]

The Equal Protection Clause forbids prosecutors from exercising peremptory challenges based on race. Batson v. Kentucky, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Where a defendant contends that a prosecutor's peremptory challenges are racially motivated, the court must conduct a three-step analysis. Id. at 96. In the first step, the defendant must make a prima facie showing that a prosecutor's peremptory challenges were racially motivated. Id. The preliminary issue of whether petitioner made a prima facie showing of discrimination becomes moot when the trial court proceeds directly to steps two and three of the Batson analysis. Stubby v. Gomez, 189 F.3d 1099, 1104 (9th Cir. 1999), *cert. denied sub nom.* Stubby v. Terhune, 121 S.Ct. 88, 148 L.Ed.2d 49 (2000).

In step two of the Batson analysis, "the burden shifts to the prosecution to articulate a race-neutral explanation for the exercise of the peremptory challenge in question." McCain



v. Prunty, 217 F.3d 1209, 1220 (9th Cir. 2000). "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral." Stubby, 189 F.3d at 1105.

Once the prosecutor has issued an explanation, the final step of the Batson analysis requires the trial judge to determine "whether the defendant has carried his burden of proving purposeful discrimination." McCain, 217 F.3d at 1220. The court has a duty to evaluate the credibility and persuasiveness of the prosecutor's explanations. Purkett v. Elem, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995); McCain, 217 F.3d at 1220. However, "[n]either Batson nor its progeny requires that the trial judge make specific findings, beyond ruling on the objection." United States v. Gilliam, 167 F.3d 1273, 1278 (9th Cir.), *cert. denied*, 528 U.S. 900, 120 S.Ct. 235, 145 L.Ed.2d 197 (1999).

A trial court's ultimate determination on the issue of intentional discrimination in jury selection is entitled to great deference, since the trial court's findings are largely dependent on the judge's observations of the attorneys and an evaluation of their credibility. Windham v. Merkle, 163 F.3d 1092, 1099 (9th Cir. 1999). Furthermore, "a determination of a factual issue made by a State Court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

In the present case, the trial judge ruled that petitioner established a prima facie case of racial discrimination and required the prosecutor to justify her peremptory challenge. The prosecutor offered two race-neutral justifications for her peremptory challenge—the juror's demeanor and age. Both rationales were legitimate grounds for challenging the prospective juror. First, the prosecutor explained that the

juror "rolled her eyes" upon being question questioned by the judge. [RT at 66-67.] Certain types of juror behavior, including lack of eye contact, fidgeting, and inattentiveness, constitute race-neutral reasons for juror dismissal since the behaviors indicate disinterest in being a juror. See Stubby, 189 F.3d at 1105-07; United States v. Changco, 1 F.3d 837, 840 (9th Cir. 1993); United States v. Power, 881 F.2d 733, 740 (9th Cir. 1989). Thus, the juror's "eye-rolling" could have indicated that she was int interested in or respectful of the court proceedings. Although the trial judge did not personally observe the juror "roll" her eyes, he made a finding that the prosecutor's proffered explanation was sincere and legitimate, and this Court must respect that finding unless it is rebutted by petitioner with clear and convincing evidence. Petitioner has mad no such showing here.

The prosecutor also justified her peremptory challenge by noting her concern that the juror might be "too tolerant" of drug possession given her young age. [RT at 66-67.] Age groups are not protected classes for the purposes of jury selection. See United States v.Pichay, 986 F.2d 1259 (9th Cir. 1993); United States v. Jackson, 983F.2d 757, 762 (9th Cir. 1993). Furthermore, there is no indication in the record that the prosecution's age-related justification was a mere pretext for racial discrimination. The prosecutor challenged at least one Caucasian juror on the basis of age. [RT at 67, 71.] Such cross-racial consistency in the exercise of age-based peremptory challenges tends to indicate that the prosecutor's justification was race-neutral. Turner v. Marshall, 121 F.3d 1248, 1251-52 (9th Cir. 1997), *cert. denied*, 522 U.S. 1153, 118 S.Ct. 1178, 140 L.Ed.2d 186 (1998). Given the absence of any showing by petitioner to the contrary, this Court must defer to the state courts' finding that the prosecutor's age-based justification was a sincere and legitimate ground for exercising the peremptory challenge.



The prosecutor offered facially race-neutral explanations for her peremptory challenge. The trial court found that these explanations were legitimate and that the prosecutor was not harboring any discriminatory intent. Petitioner has not rebutted these findings with clear and convincing evidence, and the decisions of the state courts were not contrary to, or an unreasonable application of, clearly established federal law. As such, petitioner's claim of discriminatory jury selection must be denied.

## IV. Recommendation

For all of the foregoing reason, IT IS RECOMMEND that the District Court issue and order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the Petition with prejudice.

DATED: July 11, 2001 /s/

ARTHUR NAKAZATO
UNITED STATES MAGISTRATE JUDGE

LODGED
CLERK, U.S. DISTRICT COURT
JUL 12 2001
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

| | | |
|---|---|---|
| STEVEN MARTELL COLLINS, | ) | Case No. CV 98-9329 TJH (JN) |
| Petitioner, | ) | |
| v. | ) | JUDGMENT |
| BERTRAM RICE, Warden, | ) | **PROPOSED** |
| Respondent. | ) | |

IT IS HEREBY ADJUDGED that this action is dismissed with prejudice for the reasons set forth in the related Magistrate Judge's Report and Recommendation.

DATED: _____, _____

TERRY J. HATTER, JR.
CHIEF UNITED STATES DISTRICT JUDGE

# APPENDIX G

LODGED
CLERK, U.S. DISTRICT COURT
JUL 12 2001
CENTRAL DISTRICT OF CALIFORNIA
BY MC DEPUTY

UNITED DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

| | |
|---|---|
| STEVEN MARTELL COLLINS, | Case No. CV 98-9329 TJH (AN) |
| Petitioner, | PROPOSED ORDER APPROVING AND ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE |
| v. | |
| BERTRAM RICE, Warden, | |
| Respondent. | |

Pursuant to 28 U.S.C. § 636, the court has reviewed the file, including the Magistrate Judge's Report and recommendation, *de novo*.

IT IS ORDERED:

1. The Report and Recommendation is approved and adopted.

2. Judgment shall be entered dismissing the Petition with prejudice.

IT IS FURTHER ORDERED that the clerk shall serve a copy of this Order and the Judgment on all counsel or parties of record.

DATED: _____, _____

TERRY J. HATTER, JR.
CHIEF UNITED STATES DISTRICT JUDGE

# APPENDIX H

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**SECOND APPELLATE DISTRICT**

**DIVISION THREE**

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>STEVEN MARTELL COLLINS,<br><br>Defendant and Appellant. | B106939<br><br>(Super. Ct. No. YA028034) |

COURT OF APPEAL-SECOND DIST.
FILED
DEC 12 1997
JOSEPH A. LANE Clerk
M.GAVINSKI Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Andrew C. Kauffman, Judge. Affirmed.

Koryn & Koryn and Sylvia Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, and Robert F. Katz, Supervising Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Steven Martell Collins appeals the judgment entered after conviction by jury of possession of rock cocaine. (Health & Saf. Code, § 11350, subd. (a).) The

jury found Collins had two prior serious or violent felony convictions within the meaning of the Three Strikes Law, and three prior prison terms within the meaning of Penal Code Section 667.5, subdivision(b).[1] The trial court sentenced Collins to a term of 25 years to life in state prison.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *Prosecution evidence.*

Viewed in accordance with the usual rule of appellate review (*People v. Rayford* (1994) 9 Cal.4th 1, 23; *People v. Johnson* (1980) 26 Cal.3d 557, 575-577), the evidence established that on March 19, 1996, at approximately 1:40 a.m., sheriff's deputy Richard Schlegel made a traffic stop of a vehicle being drive by Collins on Normandie Avenue. A female passenger was in the front seat of the car with Collins. Schlegel discovered Collins had an outstanding warrant and arrested him. In a search pursuant to that arrest, Schlegel found a small zip-lock baggy containing .10 grams of cocaine in base form. Schlegel testified this is a usable amount consisting of approximately two doses.

Julie Ramirez, case records specialist for the Department of Corrections, testified the contents of Collins's section 969, subdivision (b), prison packet indicated Collins had been convicted of robbery and forcible rape in 1982, possession of a firearm by a felon in 1993, and that he had been sentenced to state prison on each case. Sheriff's deputy Larry Mitchell found Collins's fingerprints matched those contained in the prison packet.

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1. Subsequent unspecified statutory references to the Penal Code.



2. *Defense evidence.*

Collins testified in his own defense. Collins claimed he had just arrived in town and was on his way to visit his father when he saw the deputies for the first time. Collins looked at them but continued on his way. About twenty minute later, Collins saw Patricia Johnson on the street and offered her a ride. When the deputies stopped Collins, Schlegel took Collins's car keys and searched the vehicle. Schlegel search Collins thoroughly and took both of Collins's wallets to verify ownership of Collins's car Schlegel then searched the car and Collins again. Collins claimed Schlegel searched him a total of four times. Finally, Schlegel held up a small baggy, told Collins he was going to jail, "for this," and asked, "Is this yours?" Collins denied it was but Schlegel arrested him.

3. *Sentencing considerations.*

The jury convicted Collins of the underlying offense and found he had suffered two prior serious or violent felony convictions.

At the time of sentencing, the trial court noted Collins previously had sought an order striking the prior serious or violent felony convictions in the interests of justice but noted that motion had been ruled on prior to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The trial court stated: "[H]owever, I do not see that this is an appropriate case for the court to exercise its discretion. [¶] . . . [A]lthough he was convicted in 1982 of the two prior strikes, he was mot recently discharged from parole for those very same convictions in June of 1992. And in July of 1993, he was rearrested for a subsequent felony and was on parole for that felony when this offense was committed."[2]

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2. The report of the probation officer prepared for

The trial court sentenced Collins to a third strike term of 25 years to life in state prison and struck the prior prison term enhancements because the trial court had "relied significantly on the existence of that prior prison term in determining whether or not to exercise . . . discretion in this case."

## CONTENTIONS

Collins contends the trial court erroneously denied a *Wheeler* motion (*People v. Wheeler* (1978) 22 Cal.3d 258, 276-277), the evidence showed only one prior serious or violent felony conviction, the term imposed constitutes cruel and unusual punishment, and the case must be remanded for an informed exercise of the trial court's *Romero* discretion.

## DISCUSSION

1. *Collins was not denied a representative jury.*

a. *Background information.*

During voir dire, prospective juror no. 016 testified she lives in Inglewood, she is single, she had no children, no prior jury experience and she works as an automations clerk for the Federal Aviation Administration. Prospective juror no. 016 indicated no one close to her had ever been accused of narcotics related offenses, she had no reason to believe drug dealers were in her neighborhood and she thought

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sentencing in this case indicated Collins was convicted in 1982 of forcible rape and robbery and was sentenced to 14 years in state prison. Collins also was convicted of resisting arrest in 1991, and defrauding an innkeeper and possession of a firearm in 1993. Collins was sentenced to four years in state prison on the latter offense. He was paroled from Department of Corrections on September 26, 1995.



possession of rock cocaine should be against the law. Neither prospective juror no. 016 nor anyone close to her had ever had a problem with alcohol or drugs and prospective juror no. 016 had never been employed in law enforcement.

After the prosecutor had exercised peremptory challenges as to prospective jurors no. 019 and 016, both of whom were African-Americans, defense counsel objected. The trial court found a prima facie case of group bias had been established and asked the prosecutor to justify the peremptory challenges to the two prospective jurors.

The prosecutor responded both prospective jurors were "young and I was converned with them being too tolerant for this type of case. [¶] Also, Ms. 016 made a remard when the judge made a response to her comment 'Uh-huh,' she turned away and rolled her eyes. [¶] I don't think you asked her specifically to give a yes or no, but she went 'yes' and rolled her eyes and turned away from the court. [¶] She and Mr. 006 [another prospective juror the prosecutor had excused] were both single, no ties."

As to prospective juror no. 019 the prosecutor stated, 'she also had a daughter having a drug problem and sh talked about not knowing much about what drug it was, things like that. She was not sufficiently educated in some areas to decide a case like this. But it is beyond any of her experience."

The prosecutor noted two other African-Americans prospective jurors remained seated on the prospective jury.

The trial court stated it was "satisfied" with the prosecutor's stated reason for excusing prospective juror no. 019, "that being Ms. 019's experiences with a family member who had drug problem. [¶] With regard to [prospective juror no.] 016, the court, frankly did not observe the demeanor of

Ms. 016 that was complained of by the district attorney; however, Ms. 016 was youthful person, as was 006. And one or more other prospective jurors also. [¶] The court is prepared to give the district attorney the benefit of the doubt as to Ms. 016. [¶] So the motion under the *wheeler* case is denied at this time; . . ."

b. *Collins's contention.*

Collins contends the trial court erroneously denied the *Wheeler* motion as to prospective juror no. 016. Collins argues the prosecutor claimed prospective juror no. 016 had been excused based on her age and her demeanor. However, because the trial court did not observe the prospective juror's demeanor, the trial court permitted the prosecutor to exclude prospective juror no. 016 based solely on her age.

Collins asserts age is an improper basis upon which to ground a peremptory challenge, the exclusion of a single juror of a cognizable class is sufficient to establish Wheeler error, and the trial court failed to engage in a sincere and reasoned attempt to evaluate the prosecutor's reason for excusing the prospective juror. (People v. Turner (1986) 42 Cal.3d 711, 715.) Collins claims the conviction must be reversed and the matter remanded for new trial.

c. *Applicable law.*

The use of peremptory challenges to remove prospective jurors solely on the basis of a presumed group bias based on membership in a racial group violates the state and federal Constitutions. (*People v. Turner* (1994) 8 Cal.4th 137, 164; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277; *Batson v. Kentucky* (1986) 476 U.S. 79, 89 (90 L.Ed.2d 69].)

If the trial court finds the defendant has established a prima facie case, the burden shifts to the prosecution to



provide "a race-neutral explanation related to the particular case to be tried" for the peremptory challenge. (*People v. Fuentes* (1991) 54 Cal.3d 707, 714; *Batson v. Kentucky*, *supra*, 476 U.S. at p. 97.) However, the explanation need not be sufficient to justify a challenge for cause. (*Batson v. Kentucky*, *supra*, at p. 97; *People v. Johnson* (1989) 47 Cal.3d 1194, 1216.) Jurors may be excused based on ""hunches"" and even ''arbitrary'' exclusion is permissible, so long s the reasons are not based on impermissible group bias. (*People v. Turner*, *supra*, 8 Cal.4th at p. 165.)

There is a presumption a prosecutor uses peremptory challenges in a constitutional manner. (*People v. Clair* (1992) 2 Cal.4th 629, 652.) We give great deference to the trial court in distinguishing bona fide reasons from sham excuses. (*People v. Fuentes, supra*, 54 Cal.3d at p. 714; *People v. Wheeler, supra*, 22 Cal.3d at p. 282.0

d. *Application here.*

Regarding prospective juror no. 016's youth, we reject Collins's invitation to find the young a cognizable group within the meaning of the representative cross-section rule. As Collins concedes, there is no case law to support the proposition the young are a cognizable class for the purposes of a *Wheeler* motion. Rather, numerous courts have expressly declined to recognize age as a factor that defines a cognizable group. (See, e.g., *People v. Henderson* (1990) 225 Cal.App.3d 1129, 1153 [Young people do not constitute a cognizable class] disapproved on other grounds in *People v. Davis* (1994) 7 Cal.4th 797, 805-810; *People v. McGhee* (1987) 193 Cal.App.3d 1333, 1351-1352; *People v. Marbley* (1986) 181 Cal.App.3d 45, 47-48; *People v. Parras* (1984) 159 Cal.App.3d 875 877; *People v. Estrada* (1979) 93 Cal.App.3d 76, 93; see also *People v. Stansbury* (1993) 4 Cal.4th 1017, 1061.) Moreover, peremptory challenges to youthful and/or immature prospective juror repeatedly have

been upheld as proper. (See, e.g., *People v. Sims* (1993) 5 Cal.4th 405, 430.)

Thus, we find no merit to Collins's assertion prospective juror no. 016 improperly was excluded from the jury based on her age.

Additionally, even if the prosecutor's reliance on prospective juror no. 016's youth were improper, the prosecutor also stated the prospective juror had rolled her eyes and turned away from the trial court when the trial court spoke to the prospective juror. The trial court stated it had not witnessed the conduct described by the prosecutor but indicated it was willing to give the prosecutor the benefit of the doubt.

Based on this evidence, the prosecutor's use of a peremptory challenge as to prospective juror no. 016 was proper. It is well settled that peremptory challenges may be based on a prospective juror's body language or manner of answering questions. (*People v. Montiel* (1993) 5 Cal.4th 877, 909; *People v. Fuentes, supra*, 54 Cal.3d at p. 715 ["[N]othing in *Wheeler* disallows reliance on the prospective jurors' body language or manner of answering questions as a basis for rebutting a prima facie case, . . ."]; *People v. Johnson, supra*, 47 Cal.3d at pp. 1219, 1220.) Because the prosecutor reasonably could have interpreted prospective juror no. 016's body language as indicative of hostility or disrespect, a peremptory challenge exercised on that basis was not improper.

Collin's assertion the trial court failed to make a sincere and reasoned effort to evaluate the prosecutor's justifications also fails. Absent a showing by the defendant to the contrary, we "rely on the good judgment of the trial [court]" to evaluate whether the prosecutor's reasons were bona fide. (*People v. Wheeler, supra*, 22 Cal.3d at p. 282.) Because nothing in the present record, including the trial court's



decision to give the prosecutor the benefit of the doubt as to prospective juror no. 016's demeanor, indicates the trial court did not approach its task appropriately, the conclusions reached by the trial court are entitled to great deference on appeal. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1198.)

For all the foregoing reasons, we conclude the trial court did not abuse its discretion in denying Collins's *Wheeler* motion

2. *Prior serious or violent felony convictions need not be brought and tried separately.*

Collins contends his prior convictions of robber and forcible rape both were incurred in a single prior proceedings and thus constitute a single prior serious or violent felony conviction.

This claim is meritless. The Three Strikes law does not require otherwise qualifying prior convictions to be based on charges brought and tried separately. (*People v. Fuhrman*(1997) 16 Cal.4th 930, 938-939; *People v. Allison* (1995) 41 Cal.App.4th 841, 844-845.) Thus, both of Collins's prior convictions properly constituted strikes.

3. *The sentence of 25 years to life for possession of rock cocaine with prior convictions of forcible rape and robbery is not cruel and unusual or unconstitutionally disproportionate.*

Collins contends the term imposed is cruel and unusual punishment, disproportionate to the crime for which it is imposed and to Collins's individual culpability, and it is excessive when compared to the punishment imposed for more serious offenses in this jurisdiction and when compared to the punishment imposed for the same offense in other jurisdictions. (*In re Lynch* (1972) 8 Cal3d 410, 423-424; *People v. Dillon* (1983) 34 Cal.3d 441, 477-478; *Solem v.*

*Helm* (1983) 463 U.S. 277, 286-288 [77 L.Ed.2d 637].) Collins asserts his current offense consisted of possession of .10 grams of rock cocaine. His prior convictions were incurred "in 'one swing' in 1982," when Collins was 21 years of age and he will not be eligible for parole until he has served 25 years. An individual convicted of first degree murder with a firearm is eligible for parole sooner. Collins concludes the penalty must be reduced.

We disagree.

A severe punishment is merited herein based on Collins's prior serious or violent felonies convictions and his status as a repeat offender. In light of Collins's individual circumstances and criminal history, the term is not grossly disproportionate to the current offense and does not constitute cruel and unusual punishment in violation of the Eighth Amendment. (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1134-1137; *Harmelin v. Michigan* (1991) 501 U.S. 957, 965 [115 L.Ed.2d 836]; *Rummel v. Estell* (1980) 445 U.S. 263, 284-285 [63 L.Ed.2d 382].) Nor is the punishment "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch, supra*, 8 Cl.3d at p.424; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1195-1198.)

Thus, the term is not cruel or unusual under either the federal or state constitutions.

4. *This case need not be remanded under Romero.*

Collins contends the case must be remanded because the trial court failed adequately to consider all the relevant criteria under *People v. Superior Court (Romero)*, supra, 13 Cal.4th at pages 530-531, at the time of sentencing. Collins asserts the trial court only looked at his criminal history, failed to consider the circumstances of the commission of the



current felony, and failed to make an individualized assessment based on the circumstances of this case and the offender. (*Id.*, at p. 531.) Collins asserts both of the overlooked factors were relevant because of the small amount of contraband involved in this case and the fact both his prior convictions were incurred in a single proceeding 14 years before the current offense. Collins claims the case must be remanded because it is unclear how the trial court would have exercised its informed discretion.

This claim lacks merit.

If a trial court fails to set forth its reasons in the minutes for striking a prior conviction allegation under section 1385, the order is ineffective. (*People v. Superior Court (Romero), supra*, 13 Cal.4th at p. 532; *People v. Price* (1986) 184 Cal.App.3d 1405, 1410.) However, there is no requirement the trial court support its refusal to exercise its discretion under section 1385 on the record by expressly considering every relevant factor on the record. Rather, under *Romero*, the trial court need only demonstrate awareness of its discretion. Thereafter, we review the trial court's action for an abuse of discretion. Such an abuse is found only where the trial court's sentencing choice is "arbitrary or capricious or '"exceeds the bounds of reason, all of the circumstances being considered."' [Citations.]" (*People v. Welch* (1993) 5 Cal.4th 228, 234; *People v. Stewart* (1985) 171 Cal.App.3d 59, 65.)

Here, the trial court expressly referred to the *Romero* decision and declined to exercise its discretion to strike either of Collins's prior convictions based on his criminal history. No abuse of the trial court's discretion appears. Accordingly, this case need not be remanded for resentencing.

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P.J.

We concur:

CROSKEY, J.

ALDRICH, J.

# APPENDIX I

SPECIAL AGENT IN THE AIR FORCE SPECIAL INVESTIGATIONS.

THE COURT: IS THIS SOMETHING THAT YOU CAN TALK ABOUT?

PROSPECTIVE JUROR 012: IT IS EQUIVALENT TO THE FEDERAL BUREAU OF INVESTIGATION.

THE COURT: I TAKE IT FROM TIME TO TIME, YOU DID INVOLVE YOURSELF IN CRIMINAL INVESTIGATIONS?

PROSPECTIVE JUROR 012: I DID.

THE COURT: DID YOU EVER HAVE TO TESTIFY AS A WITNESS IN REGARD TO ANY OF YOUR INVESTIGATIONS?

PROSPECTIVE JUROR 012: YES.

THE COURT: MORE THAN ONCE?

PROSPECTIVE JUROR 012: TOTAL TIME, TWICE – I'M SORRY – THREE TIMES.

THE COURT: DID YOU DEVELOP A CLOSE WORKING RELATIONSHIP WITH ANY OTHER FEDERAL LAW ENFORCEMENT AGENTS?

PROSPECTIVE JUROR 012: YES.

THE COURT: DO YOU THINK THERE WAS ANYTHING ABOUT ANY OF YOUR EXPERIENCES, MR. 012, THAT MIGHT AFFECT YOUR ABILITY TO OBJECTIVELY EVALUATE THE TESTIMONY OF A POLICE OFFICER?

PROSPECTIVE JUROR 012: NO.

THE COURT: TO BE FAIR AND IMPARTIAL IN A CRIMINAL CASE?

PROSPECTIVE JUROR 012: I WOULD BE FAIR AND IMPARTIAL.

THE COURT: MR. 003.

PROSPECTIVE JUROR 003: AS A SERGEANT IN EUROPE, I USED TO ESCORT PRISONERS.

THE COURT: WERE YOU IN THE MILITARY POLICE?

PROSPECTIVE JUROR 003: NO. AS A SERGEANT, THAT IS ONE OF OUR DUTIES, TO ESCORT PRISONERS BACK AND FORTH TO THE PRISON, TO BRING THEM BACK TO THE CITY FOR TESTIMONY.

THE COURT: DO YOU THINK THERE IS ANYTHING ABOUT ANY OF YOUR EXPERIENCES IN THAT REGARD THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 003: NO.

THE COURT: THANK YOU, 003.

DO ANY OF YOU HAVE ANY RELATIVES OR CLOSE FRIENDS THAT ARE NOW OR HAVE BEEN EMPLOYED IN ANY LAW ENFORCEMENT CAPACITY, AS FAR AS YOU KNOW?

PROSPECTIVE JUROR 007: I HAVE A FRIEND WHO IS A LONG BEACH POLICE OFFICER.



THE COURT: IS THIS A CLOSE FRIEND?

PROSPECTIVE JUROR 007: PRETTY CLOSE.

THE COURT: HAVE YOU EVER TALKED TO THIS FRIEND ABOUT ANY DUTIES OR EXPERIENCES?

PROSPECTIVE JUROR 007: NOT ON WHAT HE – I JUST KNOW THAT HE IS A POLICE OFFICER. I DON'T KNOW WHAT HE REALLY, YOU KNOW, ABOUT WHAT HE DOES DURING THE DAY OR IN GENERAL WHAT HE DOES.

THE COURT: BUT DO YOU THINK THERE IS ANYTHING THAT THE TWO OF YOU TALKED ABOUT THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 007: NO.

THE COURT: OR AFFECT YOUR ABILITY TO OBJECTIVELY EVALUATE THE TESTIMONY OF POLICE OFFICER?

PROSPECTIVE JUROR 007: NO.

THE COURT: 014.

PROSPECTIVE JUROR 014: MY BROTHER USED TO BE A POLICEMAN FOR COSTA MESA. HE IS NO LONGER WITH THEM.

I ALSO KNOW A COUPLE OF ATTORNEYS, POLICE OFFICERS, AS FRIENDS.

THE COURT: HAVE EVER TALKED TO ANY OF THESE PEOPLE ABOUT ANY OF THEIR PROFESSIONAL DUTIES OR RESPONSIBILITIES?

PROSPECTIVE JUROR 014: YES.

THE COURT: DO YOU THINK THERE IS ANYTHING THAT YOU HAVE TALKED TO THEM ABOUT THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL IN A CRIMINAL CASE OR THAT MIGHT AFFECT YOUR ABILITY TO OBJECTIVELY EVALUATE THE TESTIMONY OF A POLICE OFFICER?

PROSPECTIVE JUROR 014: NO.

THE COURT: NOW, POSSESSION OF DRUGS IS SOMETIMES REFERRED TO AS A VICTIMLESS CRIME; YOU ARE NOT GOING TO HEAR ANY TESTIMONY IN THIS CASE ABOUT ANYBODY BEING SHOT, STABBED; NOBODY HAD ANY PROPERTY TAKEN FROM THEM; AS A CONSEQUENCE, THERE ARE PEOPLE THAT RE OF THE VIEW THAT A FAR AS THIS TYPE OF CHARGE IS CONCERNED, THAT THIS TYPE OF CONDUCT REALLY SHOULD NOT BE AGAINST THE LAW; DO ANY OF YOU THAT WAY?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: DO ANY OF YOU THINK THAT THE POLICE ARE WASTING THEIR TIME ENFORCING THIS TYPE OF LAW THEY HAVE MORE IMPORTANT THINGS TO DO?

(THE PROSPECT JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: LET'S CALL TWO OTHER NAMES, PLEASE.



THE CLERK: JUROR NO. 1, 016.

JUROR NO. 10, 017.

THE COURT: GOOD AFTERNOON, MS. 016.

GOOD AFTERNOON, MS. 017.

MS. 016, HAVE YOU BEEN ABLE TO HEAR ALL OF THE QUESTIONS THAT I HAVE ASKED THUS FAR?

PROSPECTIVE JUROR 016: YES, I HAVE.

THE COURT: IF I WERE TO ASK YOU THE SAME QUESTIONS I HAVE ASKED THE OTHER PROSPECTIVE JURORS OR SUBSTANTIALLY SIMILAR ONES, DO YOU THINK YOU WOULD ANSWER ANY QUESTION DIFFERENTLY THAN MOST OF THEM HAVE?

PROSPECTIVE JUROR 016: NO.

THE COURT: WHAT ABOUT YOU, 017?

PROSPECTIVE JUROR 017: NOT AS TO ANYTHING YOU ASKED SO FAR.

THE COURT: DO YOU KNOW ANYTHING ABOUT THIS CASE, MS. 016, OTHER THAN WHAT YOU HAVE PICKED UP FROM SITTING IN THE AUDIENCE TODAY?

PROSPECTIVE JUROR 016: NO.

THE COURT: WHAT ABOUT YOU, MS. 017?

PROSPECTIVE JUROR 017: NO.

THE COURT: DO YOU KNOW ANYBODY THAT HAS BEEN IDENTIFIED AT COUNSEL TABLE, MS. 016?

PROSPECTIVE JUROR 016: NO.

THE COURT: 017?

PROSPECTIVE JUROR 017: NO.

THE COURT: IS THERE ANYTHING ABOUT THE NATURE OF THE CHARGE OF POSSESSION OF ROCK COCAINE, MS. 016, THAT MIGHT MAKE IT DIFFICULT FOR YOU TO SIT ON THIS CASE?

PROSPECTIVE JUROR 016: NO.

THE COURT: 017?

PROSPECTIVE JUROR 017: NO.

THE COURT: WOULD YOU BE ABLE TO STAY WITH US THROUGH THE END OF WEEK, 016?

PROSPECTIVE JUROR 016: YES.

THE COURT: MS. 017?

PROSPECTIVE JUROR 017: YES.

THE COURT: DO YOU FEEL THAT YOU UNDERSTAND THE CONCEPT OF THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF, MS. 016?



PROSPECTIVE JUROR 016: YES.

THE COURT: MS. 017?

PROSPECTIVE JUROR 017: YES.

THE COURT: WOULD YOU BE ABLE TO DECIDE THIS CASE SOLELY ON THE EVIDENCE AND THE INSTRUCTIONS OF LAW AND WITHOUT REGARD TO ANY PERSONAL FEELINGS, MS. 016?

PROSPECTIVE JUROR 016: YES.

THE COURT: MS. 017?

PROSPECTIVE JUROR 017: YES.

THE COURT: MS. 016, WOULD YOU GIVE US THE INFORMATION ON THE BOARD?

PROSPECTIVE JUROR 016: MY NAME IS 016. I LIVE IN INGLEWOOD. I AM SINGLE. I HAVE NO CHILDREN. I AM AN AUTOMATIONS CLERK FOR THE FEDERAL AVIATION ADMINISTRATION.

I HAVE NO PRIOR JURY EXPERIENCE.

PROSPECTIVE JUROR 017: MY NAME IS 017. I LIVE IN TORRANCE. I AM MARRIED. I HAVE TWO GROWN CHILDREN LIVING IN REDDING.

MY HUSBAND IS A RETIRED SHEET METAL MECHANIC AND I AM A HOUSEWIFE.

I HAVE BEEN ON TWO DRUNK DRIVING AND ONE MALPRACTICE SUIT.

THE COURT: AS FAR AS THE TWO DUI CASES WERE CONCERNED, WAS THE JURY ABLE TO REACH VERDICTS, MS. 017?

PROSPECTIVE JUROR 017: YES.

THE COURT: IF YOU WERE SELECTED TO SERVE ON THIS CASE, DO YOU THINK YOU COULD DECIDE THIS CASE INDEPENDENTLY OF THOSE THREE OTHER CASES?

PROSPECTIVE JUROR 017: YES.

THE COURT: ARE YOUR TWO CHILDREN IN REDDING WORKING?

PROSPECTIVE JUROR 017: MY ONE SON IS A ROOF AND GUTTER CONTRACTOR. AND MY OTHER SON WORKS FOR HIM.

THE COURT: MS. 016, WITH REGARD TO THE VARIOUS QUESTIONS THAT I ASKED ABOUT DRUGS, AND DRUG USAGE, IS THERE ANYONE CLOSE TO YOU THAT HAS EVER BEEN ACCUSED OF COMMITTING ANY CRIME THAT INVOLVED THE USE OR POSSESSION OF DRUGS OR DRUG PARAPHERNALIA?

PROSPECTIVE JUROR 016: NO.

THE COURT: WHAT ABOUT YOU, 017?

PROSPECTIVE JUROR 017: I THINK MY OLDEST SON HAD A DRUNK DRIVING YEARS AGO.

THE COURT: DID HE EVER DISCUSS THE INCIDENT WITH YOU?

PROSPECTIVE JUROR 017: NO.

THE COURT: IS THERE ANYTHING ABOUT



THAT EXPERIENCE THAT MIGHT AFFECT YOU ABILITY TO BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 017: NO.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THAT THERE ARE DRUG DEALERS IN YOUR NEIGHBORHOOD, MS. 016?

PROSPECTIVE JUROR 016: NO.

THE COURT: MS. 017?

PROSPECTIVE JUROR 017: NO.

THE COURT: DO YOU THINK THAT POSSESSION OF ROCK COCAINE OUGHT TO BE AGAINST THE LAW, MS. 016?

PROSPECTIVE JUROR 016: YES.

THE COURT: DO YOU, MS. 017?

PROSPECTIVE JUROR 017: YES.

THE COURT: HAVE YOU YOURSELF OR ANYONE CLOSE TO YOU, MS. 016, THAT HAS EVER HAD A PROBLEM WITH DRUG OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 016: NO.

THE COURT: HOW ABOUT YOU, MS. 017?

PROSPECT JUROR 017: OUTSIDE OF MY SON HAVE THAT ONE DUI, I DON'T THINK HE DRINKS NOW AND DRIVES.

THE COURT: MS. 016, HAVE YOU EVER BEEN EMPLOYED IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 016: NO.

THE COURT: HAS ANYONE CLOSE TO YOU?

PROSPECTIVE JUROR 016: NO.

THE COURT: MS. 017, HAVE YOU?

PROSPECTIVE JUROR 017: NO.

THE COURT: ANYONE CLOSE TO YOU THAT HAS?

PROSPECTIVE JUROR 017: NO.

THE COURT: AS FAR ALL 12 OF YOU ARE CONCERNED, LADIES AND GENTLEMEN, CAN ANY OF YOU THINK OF ANY REASON YOU COULD NOT BE FAIR AND IMPARTIAL JURORS IN THIS CASE?

(THE PROSPECTIVE JURY PANEL ANSWERED IN THE NEGATIVE.)

THE COURT: COUNSEL, APPROACH THE BENCH.

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)

THE COURT: MS. NACHMAN, DO YOU HAVE ANY ADDITIONAL QUESTIONS FOR CAUSE?

MS. NACHMAN: THE COURT DIDN'T MENTION WHETHER OR NOT THEY HAVE PRIORS, STARTING



WITH MS. 001 UNTIL WE GOT TO MS. 004, OTHER PRIOR JURY EXPERIENCE. I THINK THEY WERE OVERLOOKING IT.

THE COURT: DO YOU OTHERWISE PASS FOR CAUSE?

MS NACHMAN: YES.

THE COURT: MS. SATRIANO?

MS. SATRIANO: I WAS GOING TO ASK HAS ANYBODY BEEN ARRESTED FOR ANY CRIME OR HAVE ANY EXPERIENCE WITH LAW ENFORCEMENT GOOD OR BAD.

THE COURT: WELL, I ALREADY ASKED ABOUT EXPERIENCES WITH LAW ENFORCEMENT. I AM NOT GOING TO ASK WHETHER THEY HAVE BEEN ARRESTED FOR ANYTHING.

MS. SATRIANO: I MEANT IN RELATION TO THE – THEY HAVE BEEN ASKED ABOUT LAW ENFORCEMENT IN GENERAL OR JUST THAT THEY KNEW ANYBODY. I DIDN'T HEAR THE QUESTION.

THE COURT: I THINK I ASKED THAT.

ALL RIGHT.

MS. SATRIANO: I MISSED THAT.

I DON'T KNOW IF THE DISTINCTION BETWEEN CIVIL AND THE BURDEN OF PROOF, BECAUSE WE HAVE ONE LADY THAT HAS SERVED ON A CIVIL JURY.

THE COURT: WELL, DIDN'T I TALK TO THEM ABOUT THE BURDEN OF PROOF?

MS. SATRIANO: YES.

THE COURT: ANY OTHER QUESTIONS?

MS. SATRIANO: WERE THERE ANY OF THEM THAT HAVE BEEN VICTIMS OF CRIME AND WHAT KINDS OF EXPERIENCES THEY HAVE IN RELATION TO THAT?

THE COURT: I AM NOT GOING TO ASK THAT.

ARE THERE ANY OTHER QUESTIONS?

MS. SATRIANO: JUROR NO. 8 SAID THAT SHE HAD DOUBTS THAT SHE COULD BE IMPARTIAL AND YOU ASKED WHETHER SHE COULD LISTEN TO THE EVIDENCE. AFTER THAT, THAT WAS THE ONLY FOLLOWUP QUESTION. I DON'T KNOW THAT SHE EXPLAINED WHY SHE HAD DOUBTS AS TO WHETHER SHE COULD BE IMPARTIAL.

MS. :NACHMAN: SHE DID SAY SHE COULD LISTEN TO THE EVIDENCE OBJECTIVELY.

THE COURT: I WILL NOT ASK ANY ADDITIONAL QUESTIONS OF MS. 008 IN THAT AREA.

DO YOU PASS FOR CAUSE?

MS. SATRIANO: PASS FOR CAUSE

(THE PROCEEDINGS WERE RESUMED IN OPEN COURT IN THE PRESENCE OF THE



JURY AS FOLLOWS:)

THE COURT: MS 002. DID YOU TELL US WHETHER YOU HAD BEEN ON A JURY BEFORE?

PROSPECTIVE JUROR 002: YES, I DID.

I HAVE NEVER BEEN ON A JURY BEFORE.

THE COURT: MR. 003. WHAT ABOUT YOU?

PROSPECTIVE JUROR 003: NO

THE COURT: THE FIRST PEREMPTORY CHALLENGE THEN IS WITH THE PEOPLE.

MS. SANTRIANO: THANK AND EXCUSE JUROR NO. 8.

the court; 008, THANK YOU FOR YOUR SERVICE. YOU ARE EXCUSED.

THE CLERK: 018.

THE COURT: GOOD AFTERNOON, 018. HAVE YOU HEARD ALL OF THE QUESTIONS?

PROSPECTIVE JUROR 018: YES, I HAVE.

THE COURT: IF I WERE TO ASK YOU THE SAME OR SUBSTANTIALLY SIMILAR QUESTIONS, DO YOU THINK YOU WOULD ANSWER ANY QUESTION DIFFERENTLY THAN MOST OF THE OTHER JURORS HAVE?

PROSPECTIVE JUROR 018: NO, I WOULDN'T.

THE COURT: AND CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 018: YES.

THE COURT: WOULD YOU GIVE US THE INFORMATION THERE ON THE BOARD?

PROSPECTIVE JUROR 018: MY NAME IS 018. I LIVE IN RANCHO PALOS VERDES. I AM MARRIED WITH THREE GROWN CHILDREN.

I WAS FORMERLY A TEACH; I AM NOW AT HOME.

MY HUSBAND IS A PHYSICIAN. HE IS THE HEAD OF THE TRAINING PROGRAM FOR INTERNS AND RESIDENTS.

I HAVE HAD NO PRIOR JURY EXPERIENCE.

THE COURT: DO YOU FEEL THAT YOU UNDERSTAND THE CONCEPT OF THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF?

PROSPECTIVE JUROR 018: YES.

THE COURT: COULD YOU DECIDE THIS SOLELY ON THE EVIDENCE AND INSTRUCTIONS OF LAW AND WITHOUT REGARD TO ANY PERSONAL FEELINGS?

PROSPECTIVE JUROR 018: YES.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 018: NO.

THE COURT: HAVE YOU EVER HAD AN



EXPERIENCE WITH A POLICE OFFICER THAT YOU WOULD SAY WAS PARTICULARLY POSITIVE OR PARTICULARLY NEGATIVE?

PROSPECTIVE JUROR 018: NO.

THE COURT: HAVE YOU OR ANYONE CLOSE TO YOU EVER BEEN ACCUSED OF COMMITTING ANY CRIME THAT INVOLVED THE USE OR POSSESSION OF DRUGS OR DRUG PARAPHERNALIA?

PROSPECTIVE JUROR 018: NO.

THE COURT: DO YOU THINK THAT POSSESSION OF COCAINE OUGHT TO BE AGAINST THE LAW?

PROSPECTIVE JUROR 018: YES.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THAT THERE ARE DRUG DEALERS ACTIVE IN YOUR NEIGHBORHOOD?

PROSPECTIVE JUROR 018: NO.

THE COURT: THANK YOU, 018.

MS. NACHMAN, DO YOU PASS FOR CAUSE AS TO 018?

MS. NACHMAN: YES, BUT I DON'T BELIEVE – MAYBE I DIDN'T HEAR IT, WHAT HER GROWN CHILDREN DID.

PROSPECTIVE JUROR 018: OUR SON IS AN INTERN IN MEDICINE IN NORTHERN CALIFORNIA.

WE HAVE ONE DAUGHTER WHO IS

LOOKING FOR A JOB AFTER GETTING HER MASTERS DEGREE AND THE THIRD ONE IS JUST GOING BACK TO SCHOOL TO GET A BS DEGREE IN COLORADO.

THE COURT: WHAT WAS IT THAT YOU FORMERLY TAUGHT?

PROSPECTIVE JUROR 018: ENGLISH.

THE COURT: AND AT THE JUNIOR HIGH SCHOOL OR HIGH SCHOOL LEVEL?

PROSPECTIVE JUROR 018: JUNIOR HIGH.

THE COURT: MS. SATRIANO, DO YOU PASS FOR CAUSE?

MS. SATRIANO: YES.

THE COURT: THE PEREMPTORY IS WITH THE DEFENSE.

MS. NACHMAN: THE DEFENSE WOULD ASK THE COURT TO THANK AND EXCUSE JUROR NO. 12, YOUR HONOR.

THE COURT THANK YOU, 012. YOU ARE EXCUSED.

THE CLERK: 019.

THE COURT: GOOD AFTERNOON, 019.
HAVE YOU HEARD ALL THE QUESTIONS?

PROSPECTIVE JUROR 019: YES.



THE COURT: IF I WAS TO ASK YOU THE SAME OR SIMILAR QUESTIONS, DO YOU THINK YOU WOULD ANSWER THEM ANY DIFFERENTLY THAN MOST OF THE OTHER JURORS HAVE?

PROSPECTIVE JUROR 019: NO.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 019: YES.

THE COURT: WOULD YOU GIVE US THE INFORMATION ON THE BOARD, PLEASE?

PROSPECTIVE JUROR 019: MY NAME IS 019. I LIVE IN INGLEWOOD. I AM SINGLE, RETIRED. I HAVE SEVEN KIDS.

I HAVE NO PRIOR JURY EXPERIENCE.

THE COURT: WHAT WAS YOUR OCCUPATION BEFORE YOU RETIRED?

PROSPECTIVE JUROR 019: A NURSE.

THE COURT: AND ARE YOUR CHILDREN WORKING?

PROSPECTIVE JUROR 019: YES.

THE COURT: CAN YOU GIVE US THEIR OCCUPATIONS, PLEASE?

PROSPECTIVE JUROR 019: THE OLDEST ONE IS A COMPUTER MANAGER FOR A COMPANY IN VAN NUYS.

ANOTHER ONE IS A CLINICAL SOCIAL WORKER, WORKS FOR HERSELF NOW.

ONE SON HAS HIS OWN MECHANIC SHOP; ONE DOES NOT WORK. THE OTHER ONE IS IN ARIZONA WORKING FOR MCDONNELL DOUGLAS.

THE YOUNGEST IS AT HOME WITH FIVE KIDS.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 019: NO.

THE COURT: HAVE YOU EVER HAD AN EXPERIENCE WITH A POLICE OFFICER THAT YOU WOULD SAY WA PARTICULARLY POSITIVE OR PARTICULARLY NEGATIVE?

PROSPECTIVE JUROR 019: NO.

THE COURT: HAVE YOU OR ANYONE CLOSE TO YOU EVER HAD A PROBLEM WITH DRUGS OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 019: MY YOUNGEST DAUGHTER HAD A PROBLEM WITH DRUGS.

THE COURT: WHAT KINDS OF DRUGS?

PROSPECTIVE JUROR 019: I HAVE NO IDEA.

THE COURT: HOW DID YOU FIND OUT ABOUT THE PROBLEM?

PROSPECTIVE JUROR 019: I WAS INVOLVED IN IT. I HAD TO HELP HER. SHE IS THE ONE WITH THE KIDS.



I THINK IT WAS COCAINE.

THE COURT: WAS IT ROCK COCAINE?

PROSPECTIVE JUROR 019: NO.

THE COURT: HOW LONG AGO DID THAT HAPPEN?

PROSPECTIVE JUROR 019: SHE IS TWO YEARS CLEAN.

THE COURT: WAS THERE EVER A TIME WHEN SHE WAS ARRESTED AND ACCUSED OF COMMITTING SOME CRIME THAT INVOLVED THE USE OF DRUGS?

PROSPECTIVE JUROR 019: NO, I DON'T THINK SO.

THE COURT: DO YOU THINK THERE IS ANYTHING ABOUT YOUR RELATIONSHIP WITH YOUR DAUGHTER OR WHAT SHE HAS GONE THROUGH RECENTLY THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS TYPE OF CASE?

PROSPECTIVE JUROR 019: NO, I DON'T THINK SO.

THE COURT: YOU CAN PUT THAT ASIDE AND BE AS OBJECTIVE AS ANY OTHER JURORS?

PROSPECTIVE JUROR 019: YES.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THERE ARE DRUG DEALERS ACTIVE IN

YOUR NEIGHBORHOOD?

PROSPECTIVE JUROR 019: I HAVE NO REASON TO BELIEVE THAT.

THE COURT: THANK YOU, MS. 019.

MS. NACHMAN, DO YOU PASS FOR CAUSE?

MS. NACHMAN: YES.

THE COURT: MS. SATRIANO, DO YOU PASS FOR CAUSE?

MS. SATRIANO: YES.

THE COURT: THE PEREMPTORY IS WITH THE PEOPLE.

MS. SATRIANO: THE PEOPLE WOULD ASK THE COURT TO PLEASE THANK AND EXCUSE JUROR NO. 6.

THE COURT: THANK YOU, MR. 006. YOU ARE EXCUSED.

THE CLERK: 020.

THE COURT: GOOD AFTERNOON, 020. HAVE YOU HEARD THE QUESTIONS?

PROSPECTIVE JUROR 020: YES, I HAVE.

THE COURT: IF I WERE TO ASK YOU THE SAME OR SIMILAR QUESTIONS, DO YOU THINK YOU WOULD ANSWER ANY OF THEM DIFFERENTLY



THAN MOST OF THE OTHER JURORS HAVE?

PROSPECTIVE JUROR 020: NO.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 020: YES, I CAN.

THE COURT: WOULD YOU GIVE US THE INFORMATION ON THE BOARD, PLEASE?

PROSPECTIVE JUROR 020: MY NAME IS 020. I LIVE IN RANCHO PALOS VERDES. I AM MARRIED WITH TWO GROWN CHILDREN. I AM AN ACCOUNTANT.

I HAVE HAD NO MILITARY EXPERIENCE.

MY HUSBAND IS AN ENGINEER AND MY OLDEST DAUGHTER IS A MANGER FOR TRW.

MY SON IS IN COLLEGE.

I HAVE NO PRIOR JURY EXPERIENCE.

THE COURT: DO YOU THINK THAT YOU UNDERSTAND THE CONCEPT OF THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF.

PROSPECTIVE JUROR 020: YES, I DO.

THE COURT: COULD YOU DECIDE THIS CASE SOLELY ON THE EVIDENCE AND THE INSTRUCTIONS OF LAW WITHOUT REGARD TO ANY PERSONAL FEELINGS?

PROSPECTIVE JUROR 020: YES, I CAN.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 020: NO, I DON'T.

THE COURT: HAVE YOU EVER HAD AN EXPERIENCE WITH A POLICE OFFICER THAT YOU WOULD SAY WA PARTICULARLY POSITIVE OR PARTICULARLY NEGATIVE?

PROSPECTIVE JUROR 020: NO, I HAVEN'T.

THE COURT: HAVE YOU OR ANYONE CLOSE TO YOU EVER HAD A PROBLEM WITH DRUGS OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 020: NO, NOBODY HAS.

THE COURT: OR BEEN ACCUSED OF COMMITTING ANY CRIME THAT INVOLVED THE USE OR POSSESSION OF DRUGS OR DRUG PARAPHERNALIA?

PROSPECTIVE JUROR 020: NO.

THE COURT: DO YOU THINK THAT THE POSSESSION OF ROCK COCAINE OUGHT TO BE AGAINST THE LAW?

PROSPECTIVE JUROR 020: YES.

THE COURT: THANK YOU, 020.

MKS. NACHMAN, DO YOU PASS FOR CAUSE?

MS. NACHMAN: YES.

THE COURT: MS. SATRIANO, DO YOU PASS FOR CAUSE?



MS. SATRIANO: YES.

THE COURT: THE PEREMPTORY IS WITH THE DEFENSE.

MS. NACHMAN: MAY I HAVE A MOMENT?

THE COURT: YES.

MS. NACHMAN: THE DEFENSE WOULD ASK THE COURT TO THAN AND EXCUSE JUROR NO. 7.

THE COURT: THANK YOU, MS. 007 FOR YOUR SERVICE. YOU ARE EXCUSED.

THE CLERK: 021.

THE COURT: MS. 021, HAVE YOU HEARD ALL THE QUESTIONS?

PROSPECTIVE JUROR 021: YES, SIR.

THE COURT: DO YOU THINK YOU WOULD ANSWER ANY QUESTION DIFFERENTLY THAN MOST OF THE OTHER JURORS?

PROSPECTIVE JUROR 021: NO.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 021: YES.

THE COURT: WOULD YOU GIVE US THE INFORMATION ON THE BOARD, PLEASE?

PROSPECTIVE JUROR 021: MY NAME IS 021. I

LIVE IN CARSON. I AM MARRIED WITH TWO SMALL CHILDREN. I AM A CUSTOMER SUPPORT SPECIALIST FOR A MAIL COMPANY.

MY HUSBAND WSA PREVIOUSLY IN THE AIR FORCE WORKING ON THE SPACESHUTTLE. HE IS NOW AN ANALYST FOR A COMPANY THAT WORKS FOR THE DEPARTMENT OF DEFENSE.

I HAVE HAD A MURDER TRIAL AND A BURGLARY TRIAL.

THE COURT: WERE THE JURIES ABLE TO REACH VERDICTS?

PROSPECTIVE JUROR 021: YES.

THE COURT: IF YOU WERE SELECTED TO SERVE ON THIS CASE, DO YOU THIN YOU COULD DECIDE THIS CASE INDEPENDENTLY OF THOSE OTHER TWO CASES?

PROSPECTIVE JUROR 021: YES.

THE COURT: DO YOU HAVE ANY FRIENDS OR RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 021: NO.

THE COURT: HAVE YOU EVER HAD AN EXPERIENCE WITH A POLICE OFFICER THAT YOU WOULD SAY WAS PARTICULARLY POSITIVE OR PARTICULARLY NEGATIVE?

PROSPECTIVE JUROR 021: NO.

THE COURT: HAVE YU OR ANYONE CLOSE TO YOU HAD A PROBLEM WITH DRUG OR ALCOHOL



ABUSE?

PROSPECTIVE JUROR 021: MY IN-LAWS DO DRUGS. I DON'T KNOW IF THEY DO RECENTLY OR NOT. THEY LIVE IN ANOTHER STATE. THEY HAVE BEEN INVOLVED IN THAT.

THE COURT: WHAT TYPE OF DRUG IS THAT?

PROSPECTIVE JUROR 021: AS FAR AS I KNOW, IT IS MARIJUANA. THERE MAY BE MORE THAN THAT. I AM NOT SURE.

THE COURT: DO YOU THINK THERE IS ANYTHING ABOUT YOUR RELATIONSHIP WITH YOUR IN-LAWS OR ANY OF THEIR HABITS THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS CASE?

PROSPECTIVE JUROR 021: NO.

THE COURT: DO YOU THINK THE POSSESSION OF COCAINE OR ROCK COCAINE OUGHT TO BE AGAINST THE LAW?

PROSPECTIVE JUROR 0021: YES.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THAT THERE ARE DRUG DEALERS ACTIVE IN YOUR NEIGHBORHOOD?

PROSPECTIVE JUROR 021: NO.

THE COURT: THANK YOU, 021.
MS. NACHMAN, DO YOU PASS FOR CAUSE?

MS. NACHMAN: PASS FOR CAUSE, YOUR

HONOR.

MS. SATRIANO: PASS FOR CAUSE, YOUR HONOR.

THE COURT: THE PEREMPTORY IS WITH THE PEOPLE.

MS. SATRIANO: THE PEOPLE WOULD ASK THE COURT TO PLEASE THANK AND EXCUSE JUROR 16.

THE COURT: THANK YOU, MS. 016. YOUR ARE EXCUSED.

THE CLERK: 022.

THE COURT: GOOD AFTERNOON, 022.
HAVE YOU HEARD ALL OF THE QUESTIONS?

PROSPECTIVE JUROR 022: YES, I HAVE.

THE COURT: DO YOU THINK YOU WOULD ANSWER ANY QUESTION DIFFERENTLY THAN MOST OF THE OTHER JURORS HAVE?

PROSPECTIVE JUROR 022: YES. ABOUT A PARTICULAR LY POSITIVE OR PARTICULARLY NEGATIVE INCIDENT WITH POLICE OFFICER, I THINK I HAVE HAD BOTH.

THE COURT: DO YOU THINK THAT ANY OF THOSE EXPERIENCES, BE THEY POSITIVE OR NEGATIVE, MIGHT AFFECT YOUR ABILITY TO OBJECTIVELY EVALUATE THE TESTIMONY OF A POLICE OFFICER?

PROSPECTIVE JUROR 022: NO, I DO NOT.



THE COURT: ARE THERE ANY QUESTIONS THAT YOU WOULD HAVE ANSWERED DIFFERENTLY:

PROSPECTIVE JUROR 022: NO.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 022: YES.

THE COURT: WOULD YOU GIVE US THE INFORMATION ON THE BOARD, PLEASE?

PROSPECTIVE JUROR 022: MY NAME IS 022. I LIVE IN REDONDO BEACH. I AM DIVORCED, NO CHILDREN. I AM SELF-EMPLOYED IN THE READY-MIX CONCRETE BUSINESS.
MY EX IS UNEMPLOYED.
I HAVE NO PRIOR JURY EXPERIENCE.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 022: NO, I DON'T.

THE COURT: HAVE YOU OR HAS ANYONE CLOSE TO YOU EVER HAD A PROBLEM WITH DRUG OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 022: YES, A COUSIN, BROTHER ALCOHOL.

THE COURT: BOTH?

PROSPECTIVE JUROR 022: YES.

THE COURT: AS FAR AS YOU KNOW, HAVE THEY BEEN ACCUSED OF COMMITTING ANY CRIME AT A TIME WHEN THEY WERE UNDER THE INFLUENCE OF ALCOHOL?

PROSPECTIVE JUROR 022: NO, THEY HAVE NOT.

THE COURT: IS THERE ANYTHING ABOUT ANY OF YOUR EXPERIENCES WITH EITHER OF THEM OR YOUR RELATIONSHIP THAT MIGHT AFFECT YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS TYPE OF CASE?

PROSPECTIVE JUROR 022: NO.

THE COURT: DO YOU THINK THAT THE POSSESSION OF ROCK COCAINE OUGHT TO BE AGAINST THE LAW?

PROSPECTIVE JUROR 022: YES.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THAT THERE ARE DRUG DEALERS ACTIVE IN YOUR NEIGHBORHOOD?

PROSPECTIVE JUROR 022: NO.

THE COURT: THANK YOU, 022.
MS. NACHMAN, DO YOU PASS FOR CAUSE?

MS. NACHMAN: PASS FOR CAUSE, YOUR HONOR.

MS. SATRIANO: PASS FOR CAUSE, YOUR HONOR.

THE COURT: THE PEREMPTORY IS WITH THE



DEFENSE.

MS. NACHMAN: THE DEFENSE WOULD ASK THE COURT TO THANK AND EXCUSE 021.

THE COURT: THANK YOU FOR YOUR SERVICE, 021. YOU ARE EXCUSED.

THE CLERK: 023.

THE COURT: GOOD AFTERNOON, 023.

HAVE YOU HEARD ALL THE QUESTIONS?

PROSPECTIVE JUROR 023: YES.

THE COURT: DO YOU THINK YOU WOULD ANSWER ANY QUESTIONS DIFFERENTLY THAN MOST OF THE OTHER JURORS HAVE?

PROSPECTIVE JUROR 023: YES, YOUR HONOR.
I HAVE A PERSONAL FEELING ABOUT THE SUBJECT MATTER OF DRUGS THAT LEADS ME TO BELIEVE THAT I COULDN'T BE IMPARTIAL AS A JUROR IN THIS CASE.

THE COURT: I APPRECIATE YOUR LETTING US KNOW THAT, SIR.
YOU ARE EXCUSED.

THE CLERK: 024.

THE COURT: GOOD AFTERNOON, 024.
HAVE YOU HEARD THE QUESTIONS?

PROSPECTIVE JUROR 024: YES.

THE COURT: DO YOU THINK YOU WOULD ANSWER ANY QUESTION DIFFERENTLY THAN MOST OF THE OTHER JURORS?

PROSPECTIVE JUROR 024: YES.

I'M GOING OUT OF TOWN FOR A WEDDING THURSDAY NIGHT. SO I WILL NOT BE HERE FRIDAY.

THE COURT: WELL, WE ARE GOING TO TAKE AN ALTERNATE: SO IF WE HAVE TO, WE'LL JUST LET YOU GO.

ARE THERE ANY OTHER QUESTIONS THAT YOU WOULD HAVE ANSWERED DIFFERENTLY:

PROSPECTIVE JUROR 024: NO.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 024: YES.

THE COURT: WOULD YOU GIVE US THE INFORMATION ON THE BOARD?

PROSPECTIVE JUROR 024: MY NAME IS 024. I LIVE IN HERMOSA BEACH. I AM SINGLE; CURRENTLY I AM A HIGH SCHOOL TEACHER AND BEFORE THAT, I WORKED AS AN ACCOUNTANT AT A BIG ACCOUNTING FIRM AND I DO NOT HAVE ANY PRIOR JURY EXPERIENCE.

THE COURT: WHAT SUBJECT MATTER DO YOU TEACH?

PROSPECTIVE JUROR 024: HISTORY AND ECONOMICS NEXT YEAR.



THE COURT: DO YOU FEEL THAT YOU UNDERSTAND THE CONCEPT OF THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF?

PROSPECTIVE JUROR 024: YES.

THE COURT: COULD YOU DECIDE THIS CASE SOLELY ON THE EVIDENCE AND THE INSTRUCTIONS OF LAW AND WITHOUT REGARD TO ANY PERSONAL FEELINGS?

PROSPECTIVE JUROR 024: YES.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 024: NO.

THE COURT: HAVE YOU EVER HAD ANY EXPERIENCE WITH A POLICE OFFICER THAT YOU WOULD SAY WAS PARTICULARLY POSITIVE OR PARTICULARLY NEGATIVE?

PROSPECTIVE JUROR 024: NO.

THE COURT: HAVE YOU OR HAS ANYONE CLOSE TO YOU EVER HAD A PROBLEM WITH DRUG OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 024: NO.

THE COURT: OR BEEN ACCUSED OF COMMITTING ANY CRIME THAT INVOLVED THE USE OF OR POSSESSION OF DRUGS OR DRUG PARAPHERNALIA?

PROSPECTIVE JUROR 024: NO.

THE COURT: DO YOU THINK THE POSSESSION OF ROCK COCAINE OUGHT TO BE AGAINST THE LAW?

PROSPECTIVE JUROR 024: YES.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THAT THERE IS DRUG DEALING GOING ON IN YOUR NEIGHBORHOOD?

PROSPECTIVE JUROR 024: NO.

THE COURT: THANK YOU, 024.

MS. NACHMAN: MAY WE APPROACH?

(THE FOLLOWING PROCEEDINGS WERE AT THE BENCH:)

MS. NACHMAN: I HAVE A CONCERN ABOUT MS. 024 HAVING TO LEAVE TOWN THURSDAY NIGHT FOR A WEDDING.

I WON'T BE AVAILABLE MYSELF UNTIL 10:30. ALSO I AM SUPPOSED TO BE DOWNTOWN AT CCB FOR A SENTENCING THURSDAY MORNING. IF NEED BE, I CAN GET THAT CONTINUED OR HAVE SOMEONE STAND IN FOR ME.

I AM WONDERING ABOUT THE TIME CRUNCH. I HAVE TO BE FINISHED WITH THIS TRIAL BY FRIDAY. SO THE FACT THAT SHE IS GOING TO BE OUT OF TOWN BOTHERS ME.

ALSO, ON 022 –

THE COURT: WELL, WAIT A MINUTE. YOU ALREADY PASSED FOR CAUSE ON MR. 022.

NOW, AS FAR AS 024 IS CONCERNED –



MS. NACHMAN: CERTAINLY, IT MAY WELL BE THAT THEY MAY BE DELIBERATING AT THAT POINT. SHE SAYS SHE IS LEAVING TOWN.

THE COURT: DO YOU STIPULATE MS. 024 BE EXCUSED?

MS. SATRIANO: SO STIPULATED, YOUR HONOR.

MS. NACHMAN: SO STIPULATED, YOUR HONOR.

(THE PROCEEDINGS WERE RESUMED IN OPEN COURT IN THE PRESENCE OF THE PROSPECTIVE JURY PANEL AS FOLLOWS:)

THE COURT: MS. 024, OUT OF AN ABUNDANCE OF CAUTION, I AM GOING TO EXCUSE YOU.

THANK YOU.

THE CLERK: 025.

PROSPECTIVE JUROR 025: CAN I HAVE A SIDE BAR?

THE COURT: YES.

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)

PROSPECTIVE JUROR 025: MY WIFE IS APPARENTLY BEING TREATED FOR CRACK AND MY FAMILY IS COMPLETELY DESTROYED OVER THIS. I DON'T THINK I CAN BE IMPARTIAL.

THANK YOU.

(THE PROCEEDINGS WERE RESUMED IN OPEN COURT IN THE PRESENCE OF THE PROSPECTIVE JURY PANEL AS FOLLOWS:)

THE CLERK: 026.

THE COURT: GOOD AFTERNOON, MS. 026. HAVE YOU HEARD ALL THE QUESTIONS?

PROSPECTIVE JUROR 026: YES.

THE COURT: DO YOU THINK YOU WOULD ANSWER ANY QUESTION DIFFERENTLY THAN MOST OF THE OTHER JURORS HAVE?

PROSPECTIVE JUROR 026: NO.

THE COURT: CAN YOU BE FAIR AND IMPARTIAL?

PROSPECTIVE JUROR 026: YES.

THE COURT: WOULD YOU GIVE US THE INFORMATION ON THE BOARD?

PROSPECTIVE JUROR 026: MY NAME IS 026. I LIVE IN LOMITA. I AM MARRIED; TWO GROWN CHILDREN. ONE IS A NURSE IN BAKERSFIELD AT KAISER HOSPITAL; THE OTHER ONE, MY SON, IS IN THE MUSIC BUSINESS. AND I WORKED FOR TRW. I HAVE BEEN RETIRED FOR 11 YEARS.

I HAVE HAD JURY EXPERIENCE.

THE COURT: HOW MANY DIFFERENT



CRIMINAL CASES, IF ANY?

PROSPECTIVE JUROR 026: TWO.

THE COURT: AND THE CHARGES IN THOSE CASES?

PROSPECTIVE JUROR 026: ONE WAS AGAINST THE CITY OF INGLEWOOD, DRUGS. AND THE OTHER WAS DRUNK DRIVING.

THE COURT: WAS THE JURY IN EACH OF THOSE CASES ABLE TO REACH A VERDICT?

PROSPECTIVE JUROR 026: YES.

THE COURT: IF YOU WERE SELECTED TO SERVE ON THIS CASE, DO YOU THINK YOU COULD DECIDE THIS CASE INDEPENDENTLY OF ALL OF YOUR PREVIOUS JURY EXPERIENCES?

PROSPECTIVE JUROR 026: YES.

THE COURT: DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS IN LAW ENFORCEMENT?

PROSPECTIVE JUROR 026: NO.

THE COURT: HAVE YOU EVER HAD AN EXPERIENCE WITH POLICE OFFICER THAT YOU WOULD SAY WAS PARTICULARLY POSITIVE OR PARTICULARLY NEGATIVE?

PROSPECTIVE JUROR 026: NO.

THE COURT: HAVE YOU OR HAS ANYONE CLOSE TO YOU EVER HAD A PROBLEM WITH DRUG

OR ALCOHOL ABUSE?

PROSPECTIVE JUROR 026: NOT TO MY KNOWLEDGE.

THE COURT: OR BEEN ACCUSED OF COMMITTING ANY CRIME THAT INVOLVED THE USE OR POSSESSION OF DRUGS OR DRUG PARAPHERNALIA?

PROSPECTIVE JUROR 026: NO.

THE COURT: DO YOU THINK THAT POSSESSION OF ROCK COCAINE OUGHT TO BE AGAINST THE LAW?

PROSPECTIVE JUROR 026: YES.

THE COURT: DO YOU HAVE ANY REASON TO BELIEVE THAT THERE ARE DRUG DEALERS ACTIVE IN YOUR NEIGHBORHOOD?

PROSPECTIVE JUROR 026: NO.

THE COURT: MS. NACHMAN, DO YOU PASS FOR CAUSE?

MS. NACHMAN: PASS FOR CAUSE, YOUR HONOR.

THE COURT: MS. SATRIANO, DO YOU PASS FOR CAUSE?

MS. SATRIANO: YES YOUR HONOR. PASS FOR CAUSE.

THE COURT: THE PEREMPTORY IS WITH THE



PEOPLE.

MS. SATRIANO: THE PEOPLE WOULD ASK THE COURT TO, PLEASE, THANK AND EXCUSE 019.

THE COURT: THANK YOU MS. 019. FOR YOUR SERVICES. YOU ARE EXCUSED.

MS. NACHMAN: MAY WE APPROACH?

THE COURT: YES.

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)

(THE FOLLOWING PAGES, 66 THROUGH 72, ARE PROCEEDINGS HELD PURSUANT TO A WHEELER MOTION AND ORDERED SEALED BY THE COURT.)

# APPENDIX J

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

| | |
|---|---|
| THE PEOPLE OF THE STATE, CALIFORNIA, | ) Case No. 2 CRIM B106939<br>) (Sup. Ct. No. YA028034 |
| Plaintiff and Respondent, | ) |
| vs. | ) |
| BERTRAM RICE, Warden, | ) |
| Defendant and Appellant. | ) |

Appeal From the Superior Court of Los Angeles County
Honorable Andrew C. Kauffman, Judge Presiding

# APPELLANT'S OPENING BRIEF

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

| | |
|---|---|
| THE PEOPLE OF THE STATE, CALIFORNIA, | ) Case No. 2 CRIM B106939<br>) (Sup. Ct. No. YA028034 |
| Plaintiff and Respondent, | ) |
| vs. | ) |
| BERTRAM RICE, Warden, | ) |
| Defendant and Appellant. | ) |

**APPELLANT'S OPENING BRIEF**

## STATEMENT OF APPEALABILITY

This appeal is from a judgment that finally disposes of all issues between the parties, and is authorized by Penal Code section 1237.

## STATEMENT OF THE CASE

On April 18, 1996, appellant, Steven M. Collins, was charged in an information with possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) in count I, and driving without a license (Veh. Code, § 12500, subd. (a)), misdemeanor, in count II. (C.T. 14-15.) It was further alleged that appellant had suffered two prior serious or violent "strike" convictions (Pen. Code, §§ 667, subds. (b) - (i), 1170. 12, subds. (a) - (d)), and had served three prior prison terms (Pen.

Code, § 667.5, subd. (b)). (C.T. 15-16)[1/] At his arraignment on that same date, appellant pled not guilty and denied the prior allegations. (C.T. 18.)

On August 26, 1996, prior to the start of trial, appellant's motions to dismiss his strike priors under Penal Code section 1385, on "brought and tried separately" grounds, and on cruel and unusual punishment grounds, were heard and denied. (C.T. 52.)

On August 26, 1996, during the first day of jury selection, appellant's Wheeler[2/] motion was heard and denied. (C.T. 53.) Additionally, count II (Veh. Code, § 12500, subd. (a)) was dismissed on the People's motion in furtherance of justice. (C.T. 53.)

On August 29, 1996, following a four-day jury trial, appellant was convicted as charged with possession of a controlled substance (Health & Saf. Code, § 11350, subd. (A)). (C.T. 108, 111.) The jury also found true the allegations that appellant had suffered two prior serious or violent "strike" convictions (Pen. Code, §§ 667, subds. (b) - (i), 1170.12, subds. (a) - (d)), and had served three prior prison terms (Pen. Code, §667.5, subd. (b)). (C.T. 109-110, 112-113.)

On October 10, 1996, the court denied appellant's motion to dismiss a strike prior under Penal Code section 1385, motion to dismiss on "brought and tried separately" grounds, and motion to dismiss on cruel and unusual punishment grounds. (C.T. 120.) Thereafter, the court sentences appellant to 25 years to life, and struck punishment on the prison priors. (C.T. 120.) Additionally, the court ordered appellant to pay a $200 restitution fine pursuant to Penal Code section 1202.4, subdivision (b). (C.T. 120.) Appellant was given credit for 308 days spent in custody, including 206 actual days and 102

---

1. It was alleged that appellant was convicted of robbery (Pen. Code, § 211) and forcible rape (Pen. Code, §261, subd. (2)) on January 25, 1982, in Case No. A199738. (C.T. 15.)

2. People v. Wheeler (1978) 22 Cal.3d 258.



days good time/work time local conduct credits. (C.T. 120.)

On October 10, 1996, appellant filed a timely notice of appeal from the judgment of conviction and sentence. (C.T. 122.)

## STATEMENT OF FACTS

**Prosecution Case:**

At approximately 1:40 a.m. on March 19, 1996, Los Angeles Deputy Sheriff Richard Schlegel and his partner, Officer Creamer, were driving northbound on Normandie Avenue approaching 93 rd Street in Los Angeles when Schlegel observed appellant driving in a car in front of them. (R.T. 119-120.) Schlegel observed appellant's vehicle registration was expired, and appellant was straddling two lanes. Schlegel initiated a traffic stop by turning on his rotating lights and spotlight. (R.T. 120-121, 131.)

When Schlegel approached the driver's side of the car, he noticed a female sitting in the front passenger seat. (R.T. 121.) After determining appellant did not have his driver's license, Schlegel took appellant and placed his into the back seat of the patrol car. (R.T. 121, 136-137.) Schlegel then conducted a status check of his license on his computer, as well as a warrant check, and discovered there was a warrant for appellant's arrest. (R.T. 121-122, 132.) Appellant was then arrested and handcuffed. (R.T. 122.)

Thereafter, Schlegel searched appellant for weapons and contraband. (R.T. 122-123, 132-133, 136.) During the search, Schlegel retrieved a small zip-lock baggie containing a rock-like off-white substance resembling rock cocaine from the coin pocket of appellant's pants. (R.T. 123, 125, 134.) Based on his training and experience, Schlegel opined the rock recovered was a usable amount of cocaine. (R.T. 125.)

By stipulation, Los Angeles Sheriff's Department Criminalist Vern Traxler performed a physical and chemical test on the substance that was found in appellant's pocket, and

determined the substance contained .10 grams of cocaine in base form. (R.T. 148.)

**Defense Case**:

In the early morning hours of March 19, 1996, appellant was driving to see his father when he saw Deputies Schlegel and Creamer drive past him. (R.T. 175.) At that time, appellant did not have anyone in the car with him. (R.T. 175.)

About 20 minutes later, appellant saw Particia Johnson walking down the street and asked her why she was out that late at night. (R.T. 176.) After speaking with Johnson, appellant told her he would give her a ride because he was headed the same way. (R.T. 176-177.) When Johnson got into the car, appellant did not know she had cocaine pipes in her purse, and did not know if sh had any drugs on her. (R.T. 177.)

When he was getting ready to drive away, appellant saw Deputies Schlegel and Craemer again. (R.T. 177.) As he pulled across the intersection, the deputies made a U-turn and turned on their lights. (R.T. 178.) Appellant then stopped and the deputies pulled up behind him. (R.T. 178.)

Thereafter, Deputy Schlegel approached the driver's side of the car and asked appellant for his driver's license. (R.T. 178, 193.) Appellant told Schlegel he did not have the driver's license on him, but had a DMV printout and a California Identification card. (R.T. 179, 193.) Appellant was then told to get out of his car, at which time he was handcuffed and placed into the back of the patrol car. (R.T. 179, 193.)

At that point, Deputy Creamer stayed at the patrol car with appellant as Deputy Schlegel searched appellant's car. (R.T. 179-180.) During this time, Johnson was still sitting in the front passenger seat of appellant's car (R.T. 180.)

After searching the car, Schlegel came back to the patrol car and told appellant to get out. (R.T. 180.) Schlegel then asked appellant where the registration to the car was. (R.T.



181.) Appellant told Schlegel the papers were in his wallet in his back pocket, and Schlegel removed the wallet from appellant's pocket. (R.T. 181.) Schlegel then searched appellant again, saying, "I know you got something." (R.T. 182-183.) Appellant told Schlegel he did not have any drugs, and was then put back into the patrol car. (R.T. 183.)

Thereafter, Schlegel went back over to appellant's car and search the car again. (R.T. 181.) Schlegel then came back to the patrol car and had appellant get out. (R.T. 182.) Appellant's handcuffs were removed, and he was told to place his hands on top of his car, while Schlegel searched him again. (R.T. 183.) During the search, Schlegel again told appellant, "I know you have something." (R.T. 183.) Appellant denied having any drugs on him, and was then placed back into the patrol car. (R.T. 183.)

Soon after, Schlegel told Patricia Johnson to leave, then told appellant to get out of the car. (R.T. 183.) When appellant got out of the car, Schlegel told him he was going to jail. (R.T. 183, 191, 196.) Appellant asked Schlegel, "For what? All I have is a violation. I told the truth." (R.T. 183.) Schlegel then said "For this," and held out a plastic baggie in his hand. (R.T. 183, 191.) When he saw the baggie, appellant immediately stated, "That is not mine, sir. I never used controlled substances in my life." (R.T. 183-184 197.)

Appellant denied using rock cocaine, and denied having any in his possession on the night of March 19, 1996. (R.T. 187-188.)

Los Angeles Sheriff's Deputy George Creamer testified that when appellant was stopped, Creamer approached the passenger side of appellant's car and spoke with Patricia Johnson. (R.T. 161.)

Creamer asked Johnson to get out of the car so he could search her for weapons. (R.T. 161.) Creamer then had Johnson lift up her jacket and open her purse. (R.T. 161.) When Johnson opened her purse, Creamer observed a small bag inside, which contained a cocaine pipe. (R.T. 161-162.) When Creamer told Johnson he saw a cocaine pipe, Johnson

laughed and said she had a few pipes. (R.T. 162.) However, Creamer did not look for the other pipes. (R.T. 162.) Creamer did ask Johnson if she had any drugs on her, but Johnson said she did not. (R.T. 165.)

Creamer did not search Johnson for drugs because he felt he did not need to search her, and he does not search females thoroughly in the field with a female officer present. (R.T. 162.)

Creamer was familiar with Johnson as she was a prostitute and he had seen her hanging around the area, which was known for its high volume of drug use. (R.T. 163.) Creamer has also seen Johnson standing in front of several dope houses where cocaine is smoked. (R.T. 163.)

**Rebuttal**:

On the night of March 19, 1996, Deputy Schlegel was driving and Deputy Creamer was the passenger. (R.T. 200.) As the driver, in a traffic stop, it is Schlegel's duty to contact the driver of the vehicle, ascertain if he has a driver's license and registration for the car, and tell the driver why he was stopped. (R.T. 200.) If the vehicle is to be searched, this would be done by the deputy that was the passenger in the patrol car. (R.T. 201.) Due to officer safety concerns, a vehicle is never searched while there is still a person sitting inside. (R.T. 201.)



## ARGUMENT

### I.
### THE TRIAL COURT ERRED IN DENYING APPELLANT'S WHEELER MOTION WHERE THE PROSECUTOR IMPROPERLY USED A PEREMPTORY CHALLENGE TO ELIMINATE A YOUNG AFRICAN-AMERICAN MEMBER OF THE JURY PANEL

Appellant is African-American. (C.T. 124.) During voir dire, appellant's counsel brought a Wheeler motion based on the prosecutor's exclusion of jurors #16 and #19, two African-American members of the prospective jury panel. (R.T. 66.) The court found a prima facie case of race bias had been established, but denied appellant's Wheeler motion as it concluded that the prosecutor's reasons for excusing jurors #16 and #19 were proper. (R.T. 71-72.) Appellant respectfully submits the court's ruling s to juror #16 was erroneous and violated appellant's state and federal constitutional rights to trial by jury.[3]

#### A. The Sixth Amendment, The Fourteenth Amendment, Due Process Principles, And California Law Require that the Accused Be Tried Before An Impartial Jury of His Peers

The Sixth and Fourteenth Amendments of the United States Constitution, and Article I, section 16 of the California Constitution, guarantee a right to trial by jury to a criminal defendant, including the right to a unanimous verdict rendered by an impartial jury. (Batson v. Kentucky (1985) 476 U.S. 79

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3. Appellant does not contend that the court erred in denying the Wheeler motion as to juror #19.

[90 L.Ed. 2d 69, 106 S.Ct. 1712]; People v. Wheeler, supra, 22 Cal.3d 258.)[4] As stated by the Supreme Court in Taylor v. Louisiana (195) 419 U.S. 522, 530 [42 L.Ed2d 690, 95 S.Ct. 692], the purpose of the jury is to:

> [G]uard against the exercise of arbitrary power – to make available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and a . . .a professional or perhaps over conditioned or biased response of a judge. (Ibid.)

Regardless of whether the challenge is under state or federal law, the procedure for challenging improper us of peremptory challenges is the same. (People v. Sanders (1990) 51 Cal.3d 471, 502, fn. 10.) The defense must raise the issue at the earliest possible time and must make as complete a record as possible under the circumstances. (People v. Perez (1994) 29 Cal.App.4th 1313, 1326; People v. Ortega (1984) 156 Cal.App.3d 63, 68-70.)

Secondly, it must then be established that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. (People v. Perez, supra, 29 Cal.App.4th at p. 1326.) Thirdly, the defense must show a strong likelihood that such persons are being challenged because of group association rather than because of a specific bias. (People v. Wheeler, supra, 22 Cal.3d at p. 280.) Once the above is shown, i.e., a prima facie case, the burden then shifts to the prosecutor to come forward with a race-neutral explanation for its use of the peremptory challenge. (Id., at pp. 281-282; see also Batson v. Kentucky, supra, 476 U.S. at pp. 96-98.)

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4. Wheeler did not raise a federal constitutional violation and thus, the decision was specifically limited to a challenge under the California Constitution. (People v. Wheeler, supra, 22 Cal.3d at pp. 263, 276-277.)



In People v. Jackson (1992) 10 Cal.App.4th 13, 19, 23, the court held the appropriate appellate standard of review is the substantial evidence test and concluded that:

> [W]hen the moving party hs made a primafacie case showing of group bias in the exercise of peremptory challenges, and the opposing party has offered an explanation for the challenges which on its face is free of group bias, the issue presented to the trial court is one of fact. Accordingly, its ruling on the motion will be upheld on appeal if it is supported by substantial evidence, *unless the record indicates that the trial court misundertood the nature of its obligations* under Wheeler, *or otherwise based its rulings on something other than a resolution of the factual issue.* (People v. Jackson, supra, 10 Cal.App.4th at p. 23 [italics added].)

B. **The Trial Court Erred In Denying Appellant's Wheeler Motion After The Prosecutor's Improper Challenge To Juror #16**

Prospective juror #16 was a young, single, African-American female, who was an automations clerk for the Federal Aviation Administration. (R.T. 42.) She did not have any children. (R.T. 42.0 Juror #16 understood the concepts of reasonable doubt and presumption of innocence. She thought that possession of rock cocaine ought to be against the law. (R.T. 43.) Further, prospective juror #16 had never had any problem with alcohol or drug abuse and no one close to her had ever been accused of committing any crime that involved the use or possession of drugs or drug paraphernalia. (R.T. 42-43.)

This was the entirety of the biographical information

elicited from prospective juror #16. The prosecutor did not ask prospective juror #16 any questions.

Fter appellant's counsel objected to the prosecutor's peremptory challenges to prospective jurors #16 and #19, the court had the following colloquy with the prosecutor:

> THE COURT: Ms. Satriano, would you like to be heard as to whether there has been a prima facie case established?
>
> MS. SATRIANO: Yes. [¶] We have, it appears to me, two people of color, African-American type, left on the jury. I have excused two white people and two black people. I don't think there has been any particular people that have been excluded [¶] Apparently, there are no glaring minorities up there. So it is not like I am picking on any certain minority. I don't think there has been a sufficient showing.
>
> THE COURT: It does appear to me that a prima facie case has been established. So I am going to ask you, Ms. Satriano, to justify your peremptory challenges of Ms. 019 and Ms. 016.
>
> MS. SATRIANO: Ms. 016 as well as Ms. 019 were both young and I was concerned with them being too tolerant for this type of case. [¶] Also, Ms. 016 made a remark when the judge made a response to her comment "uh-huh," she turned away and rolled her eyes. [¶] I don't think you asked her specifically to give a yes or no, but she went "yes," and rolled her eyes and turned away from the court. (R.T. 66-67.)

Following this exchange. the court excused the jury panel and had the following colloquy with the prosecutor and appellant's counsel pertaining to juror #16:



> THE COURT: . . .Ms. Satriano, did you have any additional justification to offer for the exercise of the two peremptory challenges?
> MS. SATRIANO: I was the one to bring to the court's attention that the two African-American jurors that were excused were both female and the defendant is a male and there is a male African-American on the jury that has been on it since the beginning. I believe, of this case, of the jury panel that were seated. And there is a second female juror that is of African-American color, black color on the jury, still seated. [¶] That is it, your Honor, at this point. [¶] Does the court need cases for those types of reasons as being upheld in other courts, age and gender an inexperience with a certain subject area?
>
> THE COURT: I'll let you know. Ms. Nachman, Would you like to be heard?
>
> MS. NACHMAN: Yes. [¶] Ms. Satriano has talked about looking for more male-female balance. [¶] I thought the court was asking each of these potential jurors if they could be fair. And I don't think that should be decided upon their gender. [¶] . . . Certainly, the fact that Ms. 016 was young, I don't think that the prosecutor can pick and choose jurors by just saying I want more male-female balance or I want more older people. [¶] Two African-American jurors – and my client for the record, is African-American – have been removed without any obvious valid reasons. [¶] This is a third-strike case. It is very important. I don't feel it is right to kick people off the jury just because of their race. (R.T. 68-70.)

Following these comments, the court asked the prosecutor for authority for the proposition that challenges

based on gender were proper. The prosecutor acknowledged she did not have any and the following colloquy took place:

> THE COURT: I recall the United States Supreme court saying that the use of peremptory challenges based on gender is improper. [¶] I don't see, Ms. Satriano, that you are seeking to justify excusing people of one ethnicity based on their gender. I don't think that is going to cut it.
>
> MS. SATRIANO: I think I tied tht into a lack of ties in the community with both of them; That that was one factor that I considered; that is, the manner in which I stated that they could – that their youth was important. It was not that I don't want any young people on the jury. There are, I believe, other young people on the jury.
>
> THE COURT: I am not talking about youth versus age. [¶] Is it submitted?
>
> MS. SATRIANO: Yes.
>
> MS. NACHMAN: Submitted.
>
> THE COURT: . . . [W]ith regard to 016, the court, frankly, did not observe the demeanor of Ms. 016 that was complained of by the District Attorney; However, Ms. 016 was a youthful person as was 006. And one or more other prospective jurors also. the court is prepared to give the District Attorney the benefit of the doubt as to Ms. 016. [¶] So the Wheeler motion is denied. (R.T. 71-72.)

As will be demonstrated, the court's ruling denying appellant's Wheeler motion was erroneous because (10 the exclusion of a single juror of a cognizable group is sufficient



to establish a Wheeler motion, (2) the denial of a Wheeler motion on the basis of age alone is improper, and (3) the court did not engage in a "sincere and reasoned" attempt to evaluate the prosecutor's reasons for excluding prospective juror #16.

### 1. A Wheeler Motion Can Be Properly Brought After The Exclusion Of A Single Member Of A Cognizable Group[5/]

In light of the fact that the United States Supreme court has focused on the rights of every individual juror to sit on the jury, it appears that a violation occurs once the first juror is excluded because of his race regardless of what occurs afterwards. (Batson v. Kentucky, supra, 476 U.S. at p. 92.)

Moreover, although the focus has heretofore been on the systematic exclusion of members of the jury, it is clear that the improper exclusion of even one juror under this type of practice would violate the defendant's right to a fair trial. (People v. Fuentes (1991) 54 Cal.3d 707; see also Batson v. Kentucky, supra, 476 U.S. at pp. 84-85.)

> [T]his court, and others, sometimes use the term "systematic exclusion" to describe a discriminatory use of peremptory challenges. The term is not apposite in the Wheeler context, for a single discriminatory exclusion may violate a defendant's right to a representative jury. The term more

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5. African-Americans are a cognizable group for purposes of both Wheeler (People v. Wheeler, supra, 22 Cal.3d at p. 280, fn. 26) and Batson (Batson v. Kentucky, supra, 476 U.S. at pp. 84-89 [106 S.Ct. at pp. 1716-1719]).

properly refers to under representation in the venires from which juries are selected, in the context Duran v. Missouri (1979) 439 U.S. 357 [58 L.Ed.2d 579, 99 S.Ct. 664]. (People v. Fuentes, supra, 54 Cal.App.3d at p. 716. fn. 4; see also People v. Gonzales (1989) 211 Cal.App.3d 1186, 1193; see also Turner v. Marshall (9th Cir. 1995) 63 F.3d 807; United States v. Vasquez-Lopez (9th Cir. 1994) 1 F.3d 751 [there is no numerical requirement for a Wheeler/Batson violation, and a single improper exercise of a peremptory challenge may, under certain circumstances, be enough]; United States v. Iron Moccasin (8th Cir. 1989) 878 F.2d 226, 228-229; United States v. Roan Eagle (8th Cir. 1989) 867 F.2d 436, 440-442; United States v. Chalan (10th Cir.1987) 812 F.2d 1302, 1314.)[6]

In this regard, the view of the California Supreme Court is instructive:

> [U]nder Batson, the striking of a single black juror for racial reasons violates the equal protection clause, even though other

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6. The language in People v. Fuentes, supra, effectively overrules cases where the various Courts of Appeal have inferred that a systematic exclusion has not taken place where a prosecutor only removed two jurors or where the prosecution did not act to exclude all the members of a cognizable class of persons. (See e.g., People v. Rousseau (1982) 129 Cal.App.3d 526, 536-537; People v. Harvey (1984) 163 Cal.App.3d 90, 111-112; People v. Christopher (1991) 1 Cal.App.4th 666, 671.)



> black jurors are seated, and even when there are valid reasons for the striking of some black jurors. (People v. Fuentes, supra, 54 Cal.3d at p. 715; see also United States v. Battle (8th Cir. 1987) 836 F.2d 1084, 1086; see also United States v. Gordon (11th Cir. 1987) 817 F.2d 1538, 1541; United States v. David (11th Cir. 1986) 803 F.2d 1567, 1571; People v. Gonzalez, supra, 211 Cal.App.3d at p. 1193.)

The reason for such a rule is clear. If the discriminatory conduct impacts not only on the defendant but on the individual juror, then *any* exercise of the discriminatory practice intrudes on the integrity of the criminal proceeding by denying the defendant the right to a fair trial *and by denying* the individual juror the right to participate in the activities of the government.

### 2. The Prosecutor's Exclusion Of Juror #16 Based Solely On Her Age Was Improper

The issue regarding the exclusion of jurors because of their age is both controversial and unresolved in our highest tribunals. A line of First district cases in the specific context of Wheeler motions have refused to recognize youth as a cognizable group in the selection of petit juries. (See e.g., People v. McCoy (1995) 40 Cal.App.4th 778, 784; People v. Marbley (1986) 181 Cal.App.3d 45, 47-48; People v. Parras (1984) 159 Cal.App.3d 875, 877; People v. Estrada (1979) 93 Cal.App.3d 76, 93, disapproved on another point in DeLancie v. Superior Court (1982) 31 Cal.3d 865.) However, in light of the fact that our Supreme Court has yet to address the issue specifically, there is authority directly to the contrary, and in the Wheeler/Batson inquiry, far more persuasive. (See

Paciona v. Marshall (1974) 45 A.D.2d 462, 359 N.Y.S. 2d 608; State v. Holstrom (1969) 43 Wis.2d 465, 168 N.W.2d 574; see Also Zieger, *Young Adults as a Cognizable Group in Jury Selection* (1978) U.Mich.L.Rev. 1045.)

In a related context, several appellate opinions have held that age discrimination in the selection of grand jurors is not tolerable. (People v. Fajita (1974) 43 Cal.App.3d 454, 475-476, cert. den.; Fajita v. California (1975) 421 U.S. 964; People v. Superior Court (Dean) 1974) 38 Cal.App.3d 966, 970; but see People v. Hoiland (1971) 22 Cal.App.3d 530, holding to the contrary

Age differences in society are not random; they are patterned and systematic. Indeed, "[a]ge operates as a basis of social stratification much like class and divides our society into three broad, post-childhood segments: the young, middle-aged and aged." (Ziegler, *Young Adults as a Codnizable Group in Jury Selection*, supra, 76 U.Mich.L.Rev. at p. 1074, fns. omitted.) Since the great majority of criminal offenders are young, a jury of one's peers ought to at least include an opportunity for some representation from the same generation as part of a cross-section of the community.

Furthermore, youth of this country unquestionably comprise one of the largest and most diverse groups in society.[7] Therefore, to permit the exclusion of young people

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7. A breakdown of the United States population by age reveals that the median age is 32.9 years, and that people between the ages of 21 and 44 comprise well over one-third of our population. According to the Bureau of the Census, U.S. Department of Commerce 1990 census figures, the population breakdown is as follows:

**Total population. . . . . 248,709,873**
**Age**
Under 5 years. . . . . 18,354,443
5 to 17 years. . . . . .45,249,989
18 to 20 years. . . . . .11,726,868



from juries based on age alone suggests the bizarre notion that the greater the size of a class, the less likely it will be held cognizable for purposes of jury composition. If a minority may not be the subject of a discriminatory challenge, how could a group much larger, e.g., a majority, be excluded? The idea that size, great or small, has anything to do with this analysis is self-refuting and nonsensical. As the United States Supreme Court has noted, "Restricting jury service only to special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." (Taylor v. Louisiana, supra, 419 U.S. 522, 530.)

In the instant case, the probation report states that appellant was 35 years old at the time of his trial. (C.T. 124.) Thus, appellant might not be considered a member of the "youth" class. However, this is not dispositive as it is well-established that one need not be a member of the excluded class in order to complain of the failure to afford a jury drawn from a representative cross-section of the community. (Rubio v. Superior Court (1979) 24 Cal.3d 93, 103.)

The fact that this case involved cocaine possession is also

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**21 to 24 years. . . . . .15, 010, 898**
**25 to 44 years. . . . . .80,754,835**
45 to 54 years. . . . . 25,223,086
55 to 59 years. . . . . 10,531,756
60 to 64 years. . . . . 10,616,167
65 to 74 years. . . . . 18,106,558
75 to 84 years. . . . . ..10,055,108
85 years and over. . . . . 3,080.165
**Median age. . . . . .32.9**

(United States Population - A Typical American As Seen Through the Eyes of the Census Bureau, by Dr. Barbara Everitt Bryant, Director, Bureau of the Census, U.S. Department of Commerce - 1990, pp. 2-3.)

significant. The phenomenon of anti-drug sentiments and slogans, i.e., "Just Say No", is in large part, an outgrowth of the problem with drug abuse in today's youth. In light of this reality, the exclusion of juror #16 based solely on her youthful age underscored the error in failing to afford appellant a fair trial. Just as there can be no substitution of one racial minority for another or one sex for another, there is no logical rationale for a constitutionally permissible substitution of one age group for another. Notwithstanding appellant's recognition of the contrary authority, the importance of the constitutional fair trial implications require that this state recognize age groups as a cognizable class which may not be systematically excluded by the arbitrary use of peremptory challenges.

### 3. The Trial Court Erred In Failing To Make A "Sincere' and "Reasoned" Attempt To Evaluate The Prosecutor's Reasons For Excluding Prospective Juror #16

Once a prima facie case of race bias has been shown, the burden shifts to the other party to come forward with an explanation that demonstrates a neutral explanation related to the particular case to be tried. (People v. Tapia (1994) 25 Cal.App.4th 984, 1013.) Once a facially neutral explanation has been given, the trial court is required to satisfy itself that the explanation is *genuine*. This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily because appellate courts rely on the judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived



to avoid admitting acts of group discrimination. (People v. Hall (1983 35 Cal.3d 161, 167-168; [italics added].)"The trial court must determine not only that a valid reason existed but also that the reason actually prompted the prosecutor's exercise of the particular peremptory challenge." (People v. Fuentes, supra, 54 Cal.3d at p. 720.)

The prosecutor's justification for excusing prospective juror #16 was unjustified. Prospective juror #16 answered all of the biographical questions that were posed to her, and the court merely accepted the prosecutor's reasons without conducting a "sincere" and "reasoned" analysis. In denying appellant's Wheeler motion, the court acknowledged that it did not observe the demeanor of juror #16 that the District Attorney complained of. Nevertheless, the court denied the Wheeler motion solely based on the fact that juror #16 was young. (R.T. 71-72.) This was where the error occurred as the court failed to "undertake a 'reasoned attempt' to evaluate the prosecutor's explanations." (People v. Fuentes, supra, 54 Cal.3d at p. 720.)

The case of People v. Turner (1986) 42 Cal.3d 711, is illustrative of the court's error. In Turner, the California Supreme Court reversed the defendant's murder conviction, based upon the finding that the prosecutor's use of peremptory challenges was racially motivated. However, the high court determined not only that the prosecutor's reasons were inadequate, but that this inadequacy "was compounded by the court's apparent acceptance of those reasons at face value." (Id., at p. 727.) The court reasoned that the trial court failed "in his duty to carefully evaluate the prosecutor's proffered explanations for these challenges in light of all the circumstances of the case." (Id., at p. 715.)

> [A]s we have seen . . . the prosecutor's explanations were either implausible or suggestive of bias. They therefore "demanded further inquiry on the part of the trial court" [citation], followed by a "sincere and reasoned" effort by the court

> to evaluate their genuineness and sufficiency in light of all the circumstances of the trial [citation]. Each step is "'imperative, if the constitutional guarantee is to have real meaning' [citation]." (People v. Turner, supra, 42 Cal.3d at pp. 727-728; see also People v. Hall, supra, 35 Cal.3d 161.)

In the instant case, the prosecutor's stated reasons for excluding juror #16 was her youth and her demeanor. (R.T. 68-70.) The court did not observe the demeanor of juror #16 that was complained of by the prosecutor. Nevertheless, the court ruled that the peremptory challenge was proper because juror #16 was youthful. (R.T. 70.) As mentioned previously, this reason was improper. Since the record demonstrates that nothing other than her youth distinguished her from the community as a whole, the court erred in determining tht the prosecutor had sufficient *genuine* reasons to justify a peremptory challenge. (People v. Wheeler, supra, 22 Cal.3d at pp. 280-281; [italics added].)

### C. Where Wheeler Error Has Occurred, The Matter Must Be Reversed And Remanded For a New Trial

Where an error has occurred under Wheeler, the proper remedy is reversal of the conviction This is a reversible per se rule which has been adopted and followed continually by California courts. (People v. Motton (1985) 39 Cal.3d 596, 608; see also Holly v. J.S. Sweeping Co. (1983) 143 Cal.App.3d 588, 594.)

Even a single error, or unjustified exclusion will require reversal. (People v. Granillo (1987) 197 Cal.App. 110, 123.)

> The right to a fair and impartial jury is one of the most sacred and important of the guarantees of the constitution. Where it has been infringed, no inquiry as to the



> sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside. (People v. Wheeler, supra, 22 Cal.3d at p. 283.)

Based on the foregoing, it is evident that the court abused its discretion in denying appellant's Wheeler motion. Appellant did in fact make a *prima facie* showing of discriminatory conduct by the prosecution regarding the exclusion of prospective juror #16, and the prosecutor's reasons for excusing prospective juror #16 were insufficient to show that racial animus did not exist. The error is reversible per se. (People v. Motton, supra, 39 Cal.3d at p. 608; see also Holly v. J.S. Sweeping Co., supra, 143 Cal.App.3d at p. 594.)

II.

THE COURT ERRED IN TREATING TWO COUNTS OF CONVICTION FROM ONE PRIOR CRIMINAL CASE AS SEPARATE STRIKES UNDER THE THREE STRIKES LAW[8]

The prosecution alleged that appellant had been convicted of two prior serious or violent felonies, thereby bringing him with the "Three-Strikes" provisions of Penal Code section 667, subdivisions (d) and (e). Specifically, it was alleged that appellant was convicted of robbery (Pen. Code, § 211) and forcible rape (Pen. code, § 261, subd. (2)) on January 25, 1982, in Case No. a199738. (C.T. 15.) Appellant respectfully submits that he could not be sentences as a "Three-Strikes" offender because his two strikes arose from individual counts of the conviction in Case No. A199738. Specifically, appellant contends that the term "conviction" as used in the strikes statute is ambiguous and fails to give fair warning that each count from a single prior case can be used as a strike.

Appellant recognizes that recent Courts of Appeal have heretofore construed the statute to allow a defendant to receive a strike from each count of a single prior conviction. (See, e.g., People v. Allison (1996) 41 Cal.App.4th 841; People v. Superior Court (Arevalos) (1996) 41 Cal.App.4th 908; People

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8. Preliminarily, it should be noted that this issue is currently pending before the California Supreme Court in People v. Fuhrman (1996), formerly 47 Cal.App.4th 1740, review gr. November 13, 1996 (SO55920). Should this Court decide that appellant's contentions fail here, appellant nevertheless presents this argument so as to preserve presentation of the issue before the California Supreme Court. That Court must ultimately decide the issue and accordingly, appellant presents the argument herein.



v. Askey (1996) 49 Cal.App.4th 381.) Nevertheless, as will be demonstrated below, appellant respectfully submits these decisions were wrongly decided.

The term "prior conviction," as used in section 667, subdivision (c), is ambiguous. As such, it must be construed in favor of appellant. When the term "prior conviction" is construed in accordance with the definitions given the same term in related sections of the statute, and keeping in mind the purpose behind a recidivist statute, it is apparent that a "prior conviction" refers to separate case, not the individual counts within a case. If the term "prior conviction" means the individual counts of a case, the statute violates the constitutional guarantee of due process because it fails to give proper notice of the meaning of the term.

"When language which is susceptible of two construction s is used in a penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of a statute." (People v. Overstreet (1986 42 Cal.3d 891, 896.) Moreover, "a conclusion that a statute is ambiguous need not be premised upon the use of words which are themselves ambiguous. The structure or interaction of various parts of a statute may provide a basis for a conclusion that a statute is ambiguous." (People v. Clark (1992) 10 Cal.App.4th 1259, 1264.)

**A. The Term "Prior Conviction" As Used In Section 667, Subdivision (d) Is Ambiguous**

A defendant falls within the provisions of the strikes law if he or she "has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions as defined in subdivision (d) . . ." (Pen. Code, § 667, subd. (c).) Subdivision (d)(1) of section 667

defines a "prior conviction" as "(a) [**a]ny offense** defined in subdivision (c) of Section 667.5 as a violent felony or **any offense** defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically upon the initial sentencing, converts the felony to a misdemeanor . . . . " (Pen. Code, § 667, subd. (d)(1); [emphasis added].)

Contrary to the court of Appeal decisions, the use of the term "offense" does not clearly denote a legislative intent to allow individual counts of a prior case to each serve as a strike.

First, the Penal Code itself mandates that in interpreting its provisions, "the singular number includes the plural, and the plural the singular." (Pen. Code, § 7.) The Legislature is presumed to have been aware of section 7 when it enacted the strikes statute. (People v. Overstreet, supra, 42 Cal.3d at p. 897.) Thus, the singular "offense" could include the plural "offenses" adjudicated in a single case.

It is recognized that the term "conviction" "do[es] not have a uniform or unambiguous meaning in California." (People v. Vessell (1995) 36 Cal.App.4th 285, 291; accord Boyll v. State Personnel Bd. (1983 146 Cal.App.3d 1070, 1073.) The ambiguity in the meaning of the term "prior conviction" was noted in a memorandum prepared by the Legislation Subcommittee of the Criminal Standing Advisory Committee of the Judicial Council of California, Administrative Office of the Courts, Honorable Richard D. Huffman, Chair. The Subcommittee noted the discrepancy between section 667, subdivision (a), which limits the five year prior serious felony conviction enhancement to "charges brought and tried separately," and section 667, subdivision (e), which refers only to "two prior felony convictions." The Subcommittee observed that "it is not clear whether multiple strikes are to be imposed for convictions not brought and tried



separately." (See Advisory Committee Rep. for Judicial Council of Cal., AB 971 (JONES/COSTA) - Enactment of "Three Strikes" Legislation (1994), at p. 11.)

The California Supreme Court recently construed the term"prior conviction" in the context of the initiative version of the "Three-Strikes" statute in People v. Hazleton (1996) 14 Cal.4th 101. In Hazelton the defendant contended that the initiative version of the strikes statute, found in section 1170.12, did not allow an out-of-state prior conviction to qualify as a strike. (Id., at p. 103.) In rejecting this argument, the court ruled that the phrase "prior felony conviction" as used in section 667, subdivision (b)(1) refers to the **nature** of the prior conviction, i.e., whether it is a violent or serious felony. (Id., at p. 108; [emphasis added].)

Although subdivision (d) 91) does not clearly state whether each count in a case is to be considered a separate conviction and, thus, a separate strike, the meaning of the term "prior conviction" can be ascertained from the other subdivisions of the statute. For example, in subdivisions (c)(6) and (c)(7) of section 667[9], the term "conviction means a

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9. Penal Code section 667, subdivision (c) provides, in relevant part: "Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has **one or more prior felony convictions** as defined in subdivision (d), the court should adhere to each of the following: . . . (6) If there is **a current conviction for more than one felony count** not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e). (7) If there is **a current conviction for more than one serious or violent felony** as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law." (Emphasis added.)

single case consisting of "more than one felony count" (Pen. Code, § 667, subd. (c)(6)) or more than one serious or violent felony." (Pen. Code, § 667 subd. (c)(7).) This definition of "conviction" is similar to the definition of "prior conviction" found in section 667, subdivision (a). There, a prior conviction can be imposed only for "charges brought and tried separately."[10/] (See In re Harris (1989) 49 Cal.3d 131, 136.)

Similarly, under the strikes statute, multiple counts of a prior juvenile adjudication are treated as a single prior conviction. Section 667, subdivision (d)(3) provides that "[a] prior juvenile adjudication shall constitute a prior felony conviction." A juvenile "adjudication" is a finding that a juvenile is a ward of the court. (Welf. & Inst. Code, § 602.) Each adjudication can result from many different felony offenses. (See, e.g., In re Richard C. (1994) 24 Cal.App.4th 966, 968.) Yet, the Legislature did not make each separate juvenile offense a separate "prior felony conviction" under the statute, only each prior juvenile adjudication constitutes strike, irrespective of the number of felonies in each adjudication. There is nothing in the statute to suggest that the Legislature assumed a different treatment for adult prior convictions.

"It is well-settled that a word or phrase should be given the same same scope of meaning when it appears in separate parts of a statute." (People v. Mirmirani (1981) 30 Cal.3d

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10. Penal Code section 667, subdivision (a) provides: "(1) In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to sentence imposed by the court for the present offense, a five-year enhancement for each such **prior conviction on charges brought and tried separately**. The terms of the present offense and each enhancement shall run consecutively." (emphasis added.)



375, 382, fn. 6.) Thus, the term "conviction" in subdivision (d) should be afforded the same meaning as that term is given in subdivisions (a) (1), (c) (6), (c) 7), and (d) (3), i.e., that a conviction consists of the entire case and not the individual counts within a case. Under this definition, the separate counts of appellant's prior case -- Case No. A199738 -- would comprise just one "prior conviction."

The Legislature's failure to expressly state that individual counts of a single prior case each count as a strike is significant when considered in light of other restrictions expressly provided for in the statute. For example, the Legislature expressly provided that application of the "Three-Strikes" law is not restricted by the length of time between the prior and current convictions (Pen. Code, § 667, subd. (c) (3)), a restriction found in both section 667.5 (regarding prior prison terms) and section 6676.7 (regarding habitual offenders of crimes involving great bodily injury).

Similarly, the Legislature specifically provided that the determination of whether a prior felony conviction qualifies as a strike is not restricted by the failure of the prior to result in a prison term (Pen. Code, § 667, subds. (d) (1) (A)-(B)), a restriction found in section 667.6. In addition, the Legislature expressly provided that a determination of whether a prior felony conviction qualifies as a strike is not affected by placement in the California Rehabilitation Center (Pen. Code, § 667, subd. (d) (1) (D)). another restriction found in section 667.5. (See People v. Shoals (1992) 8 Cal.App.4th 475, 501.)

As acknowledged earlier, several Courts of Appeal have held that prior counts form a single case can be used a separate strikes. (See, e.g., People v. Superior Court (Arevalos), supra, 41 Cal.App.4th 908; People v. Allison, supra, 41 Cal.App.4th 841; People v. Askey, supra, 49 Cal.App.4th 381.) These courts have reasoned that if the Legislature had wanted to require the strikes to be from separate cases, it could have so asserted. (People v. Superior Court (Arevalos), supra, 41 Cal.App. 4th at pp. 915-916; People v. Allison, supra, 41 Cal.App.4th at pp. 845-855; People v. Askey, supra, 49

Cal.App.4th at p. 386.) None of these cases acknowledge the obvious converse conclusion – that had the Legislature intended two strikes from a single case, it could have so asserted.

Despite implications in Arevalos, Allison, and Askey that the language in the strikes law is clear and unambiguous, such a conclusion could not be further from the truth. The "emergency" legislation that was enacted as section 667, subdivisions (b) - (i), and passed by the voters as section 1170.12, is confusing and full of ambiguities. (See, e.g., People v. Hazelton, supra, 14 Cal. 4th at pp. 105-106 [Pen. Code, § 1170.12 ambiguous regarding the inclusion of out-of-state convictions in at least two respects]; People v. Superior Court (Romero) (1996) 13 Cal.4th 497, 529-530[ambiguity in whether strikes statute allows court to strike prior conviction under section 1385 construed in favor of defendant]; People v. Superior Court (Alvarez) (1997) 14 Cal.4th 968, 979 [upholding trial court's discretion to reduce felony to misdemeanor although neither version of strikes law speaks directly to the issue].)

In summary, there is an ambiguity in the strikes statute as to whether each count from a single prior case can be considered a strike. This ambiguity should be construed in favor of appellant. (People v. Overstreet, supra, 42 Cal.3d at p. 896.) Otherwise, if each count of a single prior case is allowed to serve as a strike, the determination of whether a defendant is a two or three strike offender could turn on the charging policies of a particular district attorney rather than the defendant's actions. The Legislature surely did not intend such an arbitrary and irrational result.

### B. Appellant's Construction Of the Strikes Statute Is Consistent With The Purpose Of Recidivist Statutes

Appellant's construction of the strikes statute is consistent with the purpose of recidivist statutes. As the



California Supreme court observed in People v. Balderas (1985) 41 Cal.3d 144, the presumed rationale of statutes calling for harsher penal treatment on the basis of "prior convictions" "is that an offender undeterred by his **prior brushes with the law** deserves more severe criminal treatment." (Id., at p. 202; [emphasis in original].)

In Balderas, the court considered the meaning of "prior conviction" as used in section 190.3, subdivision (c). The statute allows the trier of fact to use "prior felony convictions" as a factor in aggravation at the sentencing phase of a capital trial. the term "prior convictions" was construed to mean that the conviction of a nonviolent felony had to entered prior to the commission of the capital offense. The court found it "plausible to assume the initiative's drafters intended the use of nonviolent convictions only for their most material purpose – to demonstrate that the **capital offense** was undeterred by **prior successful felony prosecutions**." (Id., at p. 203; [emphasis in original].) Subdivision (c) of section 190.3 allows evidence of ""prior' nonviolent felony 'convictions' to show that the capital offense was the **culmination of habitual criminality** – that it was undeterred by the community's previous criminal sanctions." (Ibid.; [emphasis in original.)

Similarly, the court in People v. Rojas (1988) 206 Cal.App.3d 795 stated that the principle ""inherent in a habitual criminal statute [is] that the legislature in enacting such a statute intended it to serve as a warning to first offenders and to afford the an opportunity to reform, and **that the reason for the infliction of severer punishment for a repetition of offenses is not so much that defendant has sinned more than once as that he is deemed incorrigible when he persists** in violations of the law after conviction of previous infractions.'" (Id., at p. 799, quoting People v. Diaz (1966) 245 Cal.App.2d 74, 77-78, fn. 1; [emphasis in original].)

Thus, a recidivist is one who continues his criminal behavior despite this punishment. It is the prior punishment which teaches the offender the wrongdoing of his actions. The

number of counts affecting the length of punishment is irrelevant. As one court has stated:

> Consonant with this theory as to the purpose of the law . . . it has been held in the great majority of cases that **two or more convictions on the same day, or on different counts under the same indictment, or convictions at the same term of court cannot be cumulated so as the count as two or more previous convictions within the meaning of habitual criminal statutes**, although, as specifically held in some cases, one of such convictions may be counted as a prior conviction within the meaning of the statute. (People v. Diaz, supra, 245 Cal.App.2d at p. 88, fn. 1, citing 24 A.L.R.2D 1234, PP. 1248-1249; [emphasis added].)

In simplistic terms, if the offender commits a serious or violent crime and is prosecuted and punished, he has one strike against him and a chance to reform. If he does not reform, commits another serious or violent crime, and is prosecuted for the second time, he is punished under section 667 by having his sentence doubled. He now has two strikes against him and is given a second chance to reform. If, "undeterred by the community's previous criminal sanctions" (People v. Balderas, supra, 41 Cal.3d at p. 203), the offender commits another crime and is caught and prosecuted a third time, this is his third strike, and his sentence is life imprisonment under the "Three-Strikes" law.



Appellant received a single punishment for the two counts of conviction in Case No. A1999738. To sentence him to life imprisonment pursuant to section 667, subdivisions (b) - (i) is contrary to the objective of the habitual criminal statute. If multiple counts of a single conviction are permitted to count as strikes, then an offender who has had only one chance to reform can be treated the same as the offender who has had two chances to reform, following two separate convictions each involving one offense. Clearly this does not follow the objective behind the habitual criminal statute. Again, it is after the offender has been twice convicted of a serious or violent crime and twice punished for those crimes that he should suffer the consequences of life in prison as a three strikes offender.

Several examples serve to prove this point. They show the absurd results that can occur when each count of a single prior conviction is allowed to serve as a strike.

If a defendant with no criminal record is convicted of **multiple current** serious or violent felonies, the "three-Strikes" law does not allow the sentencing court to cumulate the current counts of conviction thereby causing the defendant to jump from "no strikes" to "strike three." The defendant may face consecutive sentencing under the strikes law (see, e.g., Pen. code, § 667,subds. (c) (6) and (c) (7)), but he is not considered a two or three strikes offender.

Similarly, if a defendant with one prior serious or violent felony on his record (perhaps a prior robbery conviction) is convicted of **multiple current** serious or violent felonies, the "Three-Strikes" law does not allow the sentencing court to cumulate the current counts of conviction thereby causing the defendant to jump from "strike one" to "strike three" and face a minimum tern of 25 years to life.

Another example further demonstrates the point. If a defendant with no strikes on his record is convicted in the current case of two serious or violent felonies, the defendant is treated as a first strike offender, i.e., he does not fall within the provision of section 667, subdivisions (b) - (i). However,

under the current interpretation of the "Three-Strikes" law by the different Courts of Appeal, immediately upon conviction of the two serious or violent felonies, the defendant now has **two strikes** on his record. The commission of **any** felony sends him to prison for a minimum term of 25 years to life. On the other hand, an offender with one serious or violent felony conviction who is later convicted of two serious or violent felonies in a single proceeding is treated as two strikes offender. There is no rational reason to treat both offenders differently. Both have committed a total of three crimes; yet, the first offender is sentenced as a three strikes offender, while the second offender is sentenced as a two strikes offender. Such a result defies common sense and the rationale behind recidivist statutes.

Appellant has had a single chance to conform to society's norms following a prior conviction consisting of two counts of serious or violent felonies which arose from a single incident. Yet, he is being treated the same as a defendant who has had two chances to reform as a result of two separate period of punishment for two separate prior serious or violent felonies. Clearly this does not comport with the objective behind a habitual criminal statute.

### C. The "Three-Strikes" Statute Violates The Constitutional Guarantee Of Due Process Because The Statute Fails To Give Notice Of Whether A Prior Case Or A Single Count Within A Prior Case Is A Strike

Although subdivision (d) (1) of section 667 purports to define a "prior conviction," it does not clarify whether a prior conviction is a prior case, regardless of the number of counts, or a single count within a prior case. As such, the statute is unconstitutionally vague in that it fails to give fair warning of the definition of a strike.

The due process clauses of the federal and state Constitutions



(U.S. Const., amend. XIV; Cal. Const., art. I, § 7) require statutes to (1) give fair warning to persons of common intelligence of the conduct proscribed or required by the statute and (2) to provide adequate guidelines to avoid vesting law enforcement authorities with unlimited discretion in the enforcement of the statute. (Calendar v. Lawson (1983) 461 U.S. 352, 357 [75 L.Ed.2d 903, 103 S.Ct. 1855]; People v. Mirmirani, supra, 30 Cal.3d at p. 382; In re Newbern (1960) 53 Cal.2d 786, 796.) A heightened standard of definiteness is required for criminal statutes. (See, e.g., Calendar v. Lawson, supra, 461 U.S. at p. 358, fn 8; In re Newbern supra, 53 Cal.2d at p. 792.)

The law requires that a fair warning ""be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statue should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used.'" (People Overstreet, supra, 42 Cal.3d at pp. 896-897, quoting McBoyle. United States (1931) 283 U.S. 283 U.S. 25, 27 [75 L.Ed. 816, 51 S.Ct. 340].)

Absent an express statement by the Legislature, the "common mind" would not understand that more than one strike could arise from a single prior case. This is particularly true give the definitions of "prior conviction" and "conviction" found elsewhere in the statute. Limiting the term "prior conviction" to a single case rather than the individual counts in a case is in accord with common usage of the term (cf. People v. Overstreet, supra, 42 Cal.3d at p. 897 [defining "pending trial" in a manner which accords with common usage of word]), and the common understanding of the intent of a recidivist statute. (cf. People v. Balderas, supra, 41 Cal.3d at p. 202).

The lack of a clear definition provides prosecutors and the courts with unlimited discretion in each case to determine which persons should be prosecuted under the "Three-Strikes" law. Each prosecutor and trial court is in effect an ad hoc legislature, determining the reach of this statute. The lack of enforcement guidelines violates state and federal constitutional guarantees of due process and the state constitutional requirement of uniform application of general laws. (See, e.g., Calendar v. Lawson, surpra, 461 U.S. at pp. 358-360; People v. Mirmirani, supra, 30 Cal.3d at p. 382.)

The term "prior conviction" as used in subdivision (d) (1) of section 667 is unconstitutionally vague. Since subdivision (d) (1) is the cornerstone of the statute – all the punishments within that statute hinge on the existence of a prior conviction – the entire statute must be deemed unconstitutional (People v. Mirmirani, supra, 30 Cal.3d at pp. 387-388, fn. 9.)

### D. Conclusion

In summary, two or more counts of a single conviction should not each be counted as a strike thereby making a defendant eligible for sentencing as a three strikes offender after just one prior brush with the law. Accordingly, the case should be remanded to the superior court with directions to vacate the sentence and to resentence appellant as a two strikes offender.



## III.

## THE SENTENCE OF 2 YEARS TO LIFE, TO APPELLANT, CONSTITUTES CRUEL AND/OR UNUSUAL PUNISHMENT

### A. Introduction

Appellant possessed a rock of cocaine with a net weight of .10 grams. (R.T. 148.) For this crime, and because of two prior "strike" convictions suffered in "one swing" in 1982. appellant was sentenced to state prison for a term of 25 years to life. Under the "Three-Strikes" law, appellant is not eligible for parole until he serves 25 years. (Pen. Code § 667, subd. (c) (5); People v. Stofle (1996) 45 Cal.App.4th 417, 421.) By contrast, someone who commits a cold-blooded premeditated murder with a firearm receives a maximum sentence of 35 years to life (sections 190, subd. (a) and 12022.5, subd. (a)(1)) and is eligible for parole earlier than appellant. (In re Oluwa (1989) 207 Cal.App.3d 439, 444-447.)

Although the "Three-Strikes" law leads to such sentencing anomalies as a longer sentence for recidivist offenders such as appellant than for violent ones such as a murderer, appellant makes no facial cruel and unusual punishment challenge to the "Three-Strikes" law itself. Instead, he contends that the sentence of 25 years to life, as applied to him, constitutes cruel and/or unusual punishment.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."Article I, section 17 of the California Constitution, using the disjunctive, provides, in relevant part: "Cruel or unusual punishment may not be inflicted . . . ."

An analysis of whether a sentence imposes cruel or unusual punishment must begin with a recognition that "in our tripartite system of government it is the function of the

legislative branch to define crimes and prescribe punishments, and that such questions are in the first instance for the judgment of the Legislature alone." (In re Lynch (1972) 8 Cal.3d 410, 414.) Nevertheless, the Legislature's authority is circumscribed by the constitutional prohibition against cruel or unusual punishment, and it is the "imperative task of the judicial branch, as coequal guardian of the Constitution, to condemn any violation of that prohibition." (Ibid.) A punishment may violate the constitution "not only if it is inflicted by cruel or unusual method, but also if it is grossly disproportionate to the offense for which it is imposed." (People v. Dillon (1983) 34 Cal.3d 441, 478; footnote omitted.)

In Lynch, the Supreme court set forth three techniques for evaluating a punishment to determine whether it is disproportionate. The court must (1) examine "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society," (2) compare the challenged penalty with punishment prescribed in California for other, more-serious offenses, and (3) compare the challenged penalty with punishments prescribed for the same offense in other jurisdictions. (In re Lynch, supra, 8 Cal.3d at pp. 425-427.) For a holding of disproportionate in all three respects. Rather, a finding of disproportionality based on any of the Lynch criterial will suffice. (People v. Dillon, supra, 34 Cal.3d 441, 4787 fn. 38; In re Rodriguez (1975) 14 Cal.3d 639, 656.) this does not mean, however, that each of the techniques must be considered in total isolation from the others. When the court stated, in Lynch, that a statute's disparity with punishments in other states "is a further measure of its excessiveness" (In re Lynch, supra, 8 Cal.3d at p. 427, emphasis added), the suggestion is that the measure of disproportionality found in applying the several techniques would be cumulative.



**B. The Penalty Is Disproportionate As Applied To This Offense And This Offender**

Given the nature of the current offense, viewed alone and in light of appellant's prior offenses, the sentence of 25 years to life violates the Eighth Amendment proscription of punishment which is extreme and grossly disproportionate to the offense.

In Harmelin v. Michigan (1991) 501 U.S. 957 [115 L.Ed.2d 836, 111 S.Ct. 2680], the portion of the lead opinion on which a majority of justices agreed, determined that the sentence in that case was not disproportionate to the offense in violation of Eighth Amendment. Justice Scalia, joined only by Justice Rhenquist, opined that the Eighth Amendment does not contain a guarantee against disproportionality for non-capital offenses. However, seven of the justices in concurring and dissenting opinions stated that the Eighth Amendment prohibits punishment which is extreme and grossly disproportionate to the offense which is the subject of the conviction. (Harmelin v. Michigan, supra, 111 S.Ct. at pp. 2703, 2705, 2709, 2719-2720.)

Since the Harmelin decision, the federal circuit courts have followed this reasoning and have been applying a gross disproportionality test in determining Eighth Amendment challenges punishments imposed for non-capital offenses. (See, e.g., Caoperdo v. Demosthenes (9th Cir. 1994) 37 F.3d 504, 507-508; United States v. Munoz (1st Cir. 1994) 36 F.3d 1229, 1239; United States v. Cupa-Guilen (9th Cir. 1994) 34 F.3d 86, 864-865; United States v. Lanier (6th Cir. 1994) 33 F.3d 639, 665; United States v. Frieberger (8th Cir. 1994) 28 F.3d 916, 920; United States v. Fisher (5th Cir. 1994) 22 F.3d 574, 579-580; United States v. Angulo-Lopez (10th Cir. 1993) 7 F.3d 1506, 1510; United States v. Sarbello (3d Cir. 1993) 985 F.2d 716, 724; McGruder v. Puckett (5th Cir. 1992) 954 F.2d 313, 316-317.) Under that analysis, the sentence

imposed in this case violates the Eighth Amendment to the United States Constitution.

When evaluating the nature of the offense, the court not only considers the offense in the abstract, but also considers the circumstances of the particular crime, such as motive, the way the crime was committed, the extent of the defendant's involvement, and the consequence of his acts. (People v. Dillon, supra, 34 Cal.3d at p. 479.) Likewise, the court views the offender in the concrete rather than the abstract, "and asks whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (Ibid.) In conducting both analyses, the court pays particular attention to the degree of danger both present to society. (In re Lynch, supra, 8 Cal.3d at p. 425.)

Appellant was convicted of possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a).) This offense is punishable by 16 months, two years, or three years when the Three Strikes law is not applied. (Health & Saf. Code, § 11350, subd. (a).) Moreover, the offense committed in this case was not particularly aggravated when compared with other possession cases. Appellant allegedly possessed a rock of cocaine that weighed a total of approximately .10 grams. (R.T. 148.)

Turning to the factors related to appellant, his prior offenses do not necessarily indicate an individual with base criminal motives. Appellant suffered his prior "strike" convictions in "one swing" as he was convicted of robbery (Pen. Code, § 211) and forcible rape (Pen. Code, § 261, subd. (2)) on January 25, 1982, in Case No. A199738. (C.T. 15.) Appellant was 21 years old at the time he committed these offenses and was 35 years old at the time of the instant offense. (C.T. 59, 124, 126; R.T. 263.)

While society cannot condone and rightfully punishes such actions as possession of illegal substances, appellant's actions should be mitigated by the minor nature of the current offense. To be sure, appellant recognizes that his prior felony



convictions arguably support some increased punishment for the current offense. However, the extreme punishment imposed in this case for possession of a rock of cocaine with a net weight of .10 grams cannot be rationalized under any credible system of criminal justice. (Cf. In re Lynch, supra, 8 Cal.3d at p. 425.)

As was aptly noted by Justice Nott in People v. Glaster (1995) 36 Cal.App.4th 785, "One of these days a case will arise wherein imposition of the 'three strikes law' is so unfair that the judiciary will be forced to reassert its traditional role as the final arbiter of what is an appropriate sentence. Whether that will be done under the basis of such rationale as separation of powers, cruel and unusual punishment, or the inherent power of the judiciary is yet to be seen. The present case is not the one in which to take such a stand. *But one will soon come along*." (People v. Glaster, supra, 36 Cal.App.4th at pp. 795-796, conc. opn. of Nott, M; [italics added].)

Appellant submits that this is precisely the case in which to take such a stand. Given the nature of the individual offender combined with the minor nature of the instant offense, indicates the punishment provided under the "Three-Strikes" law is grossly disproportionate to appellant's individual culpability and the threat he poses to society. On the facts of this case, the sentence of 25 years to life constitutes cruel and unusual punishment.

### C. The Penalty Is disproportionate When Compared With Punishment Prescribed In California For Other, More-Serious Offenses

Under the "Three-Strikes" law, appellant is not eligible for parole until he serves 25 years. (Pen. Code § 667, subd. (c) (5); People v. Stofle, supra, 45 Cal.App.4th at p. 421.) By contrast, someone who commits a cold-blooded premeditated murder with a deadly weapon receives a maximum sentence of

35 years to life (Pen. Code §§ 190, subd. (a) and 12022, subd. (b)) and is eligible for parole earlier than appellant. (In re Oluwa, supra, 207 Cal.App.3d at pp. 444-447.)

The penalty of 25 years to life imposed for appellant's offense, under the "Three-Strikes" law, is also greater than that statutorily prescribed for: rape, robbery, voluntary manslaughter, assault with a machine gun, carjacking, or burglary. (See Pen. Code, §§ 193, subd. (a), 211, subd. (a) (1), 215, subd. (b), 245, subd. (a) (3), 264, subd. (a), 459/460.)

The question then becomes whether it is cruel or unusual to impose a sentence of 25 years to life in this case. Appellant submits that it is. A person who commits premeditated murder with a deadly weapon is eligible for parole earlier than appellant. Under no principled analysis can appellant, who possessed a rock of cocaine weighing .10 grams, be viewed as having posed a greater danger to society than a first degree murderer. As stated in Dillon, "a comparison of the challenged penalty with those prescribed in the same jurisdiction for more-serious crimes . . . is particularly striking when a more serious crime is punished less severely than the offense in question . . ." (People v. Dillon, supra, 34 Cal.3d at p. 487, fn. 38, emphasis omitted; In re Foss 1974) 10 Cal.3d 910, 925-926.)

### D. The Penalty Is Disproportionate When Compared With Recidivist Punishments In Other Jurisdictions

A comparison of the California "Three Strikes" law with recidivist statutes in other states shows that: wile California applies the same penalty to **any** current felony, many other states provides for varying increases in penalty. Greater increases are imposed where the current offense is more serious and lesser increases where it is less serious. (See, e.g., Ala. Code § 13A-5-9; Alaska Stats. § 12.55.155(a); Ariz. Rev.



Stats. § 13-604; Ark. Code Ann. § 5-4-501; Colo Rev. Stats. § 16-13-101; Conn. Gen. Stats. § 53a-40; Del. Code Ann., tit. 11, § 4214; Fla. Stats. Ann.§ 775.084; Ga. Code Ann. § 17-10-7; Hawaii Rev. Stats. §§ 706-606.5, 706-661; Ind. Stats. Ann. §§ 35-50-2-8, 35-50-2-8.5; La. Rev. Stats. Ann. § 15:529.1; Mich. Comp. Laws Ann. §§ 769.10-769.12; Mich. Stats. Ann., tit. 28, §§ 1082-1084; Miss. Code Ann., §§ 99-19-83; N.J. Stats. Ann. §§ 2C:44-3, 2C:43-7; N.Y. Pen. Law §§ 70.00-70.10; N.D. Cent. Code §12.1-32-09.)

In most other states that permit enhancement on the commission of a current felony of any type, there are limitations on the application of the statute that are absent in California. Thus, in Nebraska and Rhode Island, the first two convictions must have included a prison commitment (Neb. Rev. Stat., § 29-2221; R.I. Gen. Laws, § 12-19-21), and in Vermont, the statute applies only after conviction of four felonies (Vt. Stat. Ann., tit. 13, § 11).

Other states' recidivist statutes, which appear on their face be as Draconian as California's, in actual practice, are not enforced as rigidly as is California's. In Idaho, a third conviction of any felony requires a prison term of not less than five years, and the term may extend to life. (Idaho Code, § 19-2514.) However, that statute differs from California's because the Idaho sentencing courts have wide discretion within those bounds, whereas the California sentencing courts have no function but to mathematically compute the defendant's sentence. (State v. McPhie (1983) 104 Idaho 652v [662 P.2d 233, 237]; State v. Gauna (App.1989) 117 Idaho 83 [785 P.2d 647, 652-653].) More important, application of the recidivist statute is not mandatory; the court can sentence the defendant for the last-committed crime only, notwithstanding the prior record. (State v. Holton (App. 1991) 120 Idaho 112 [813 P.2d 923, 924].)

Further, unlike the California statute, under which consecutive sentences are mandatory (Pen. Code § 667, subd. (c) (6) - (8)), the Idaho courts retain discretion to sentence either consecutively or concurrently. (State v. Brandt (App.

1986) 110 Idaho 341 [715 P.2d 1011, 1016].) Finally, whereas 80 percent of the California sentence must be served, an Idaho defendant may be considered for parole after service of one-third of the sentence . (State v. Harrison (App. 1985) 108 Idaho 324 [699 P.2d 30, 31].)

In Washington, the statute provides a minimum ten-year sentence for a defendant with a current conviction involving fraud or petit larceny, and a prior felony or two prior misdemeanors, and a life sentence where the defendant has two prior felonies or four prior misdemeanors. (Wash. Rev. Code Ann., § 9.92.090.) However, unlike California (Pen. Code § 667, subd. (f), (g)), Washington prosecutors have discretionary charging power and may consider a wide range of factors in determining whether to file charges, as long as the exercise of the power is not arbitrary or capricious or based on indidious standards. (State v. Ross (1981) 30 Wash.App.324 [634 P.2d 887, 890].) Indeed, a statute providing that a habitual criminal allegation "shall" be filed in certain cases is directory, not mandatory. Otherwise, it would violate the defendant's right to due process. (State v. Rowe (1980) 93 Wash.2d 277 [609 P.2d 1348, 1351].)

In West Virginia, the statute provides a life sentence for a current felony conviction with two felony priors. (W.Va. Code, § 61-11-18.) However, there is parole eligibility after 15 years and the prosecutor has the power to exercise selectivity in enforcement, as long as the choice is not based on an unjustifiable standard such as race or religion. (Oyler v. Boyles (1962) 368 U.S. 448, 453 [7 L.Ed. 2d 446, 82 S.Ct. 501].)

In six states, the prosecuting attorney must make a special motion in order to seek an enhanced sentence under the recidivist statute. (Kan. Stat. Ann. § 21-4504; Ind. Code § 35-50-208.5 subd. (a); N.J. Stat. Ann. §§ 2C:44-3 & 2C:44-71]; R.I. Gen. Laws § 12-19-21, subd. (b); S.C. Code Ann. § 17-25-45, subd. (2); Va. Code Ann. § 19.2-297.1, subd. B.) In contrast, section 667, subdivisions (f) (1) and (f) (2) **require** the prosecutor to plead and prove each prior felony conviction.



The only exceptions are for insufficient evidence or for the furtherance of justice.

In sum, other than California, there appears to be no state with a recidivist statute that requires such mandatory application and length imprisonment regardless of any circumstances in mitigation. Moreover, even if there were several other states with measures as Draconian as California's Three-Strikes statute, that would not save the California statute. As stated in Lynch, "if the challenged penalty is found to exceed the punishments decreed for the offense in a significant number of those jurisdictions, the disparity is a further measure of its excessiveness." (In re Lynch, supra, 8 Cal.3d 15 p. 427, emphasis added.)

### E. Conclusion and Suggested Disposition

The constitutional provision against cruel or unusual punishment is, itself, a vital part of the law, which this Court should apply in this case. In so doing, the Court would not be ignoring the law of California; it would be applying the whole law. (People v. Dillon, supra, 34 Cal.3d at p. 494, conc. opn. of Kingsley, J.) Since the Legislature and the voters have failed to bring the "Three-Strikes" legislation into line with the well-accepted criteria of individual accountability and proportionate punishment, which is constitutionally compelled, this Court should do it for them. (People v. Dillon, supra, 34 Cal.3d at pp. 488-489.)

Appellant's history is far from perfect. However, there is no imaginable history of recidivism that would prevent a life sentence from being cruel and unusual under these circumstances. Therefore, when the court remands this case for resentencing it should instruct the trial court to impose a lesser sentence.[11/]

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11. In Dillon, the Supreme Court modified the judgment

## IV.

## THIS MATTER MUST BE REMANDED FOR RESENTENCING BECAUSE THE TRIAL COURT DID NOT ADEQUATELY CONSIDER THE RELEVANT CRITERIA UNDER ROMERO IN EXERCISING ITS DISCRETION TO STRIKE APPELLANT'S PRIOR SERIOUS FELONY CONVICTIONS PURSUANT TO SECTION 1385

At appellant's sentencing hearing on October 10, 1996, appellant's counsel requested the court to strike one of appellant's prior "strike" convictions. Following extensive argument by the prosecutor and appellant's counsel, the court denied appellant's motion and made the following comments:

> THE COURT: . . .Ms. Nachman, the record reflects that the motions that you referred to having to do with the prior convictions were previously heard and denied on the 26th of August.[12] That was

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by reducing the degree of the murder from first to second. (People v. Dillon, supra, 34 Cal.App.3d at p. 489.) In the instant case, appellant suggests that his sentence be modified (see section 1260) to the maximum allowable if his case did not fall under the "Three-Strikes" law.

12. On August 26, 1996, prior to trial, the court summarily denied appellant's motion to strike a prior



> prior to the Romero case being decided; However, I do not see that this is an appropriate case for the court to exercise its discretion.
>
> As Ms. Kaplan pointed out, the defendant, although he was convicted in 1982 of the two from parole for those very same convictions in June of 1992. And in July of 1993, he was rearrested for a subsequent felony and was on parole for that felony when this offense was committed. (R.T. 264-265.)

As will be demonstrated, this matter must be remanded for resentencing because the trial court's statements clearly demonstrate it did not adequately consider all of the relevant criteria under Romero in exercising its discretion to strike appellant's prior serious felony convictions pursuant to section 1385.

As this Court is aware, the California Supreme Court recently concluded in People v. Superior Court (Romero), supra, 13 Cal.4th 197, that a trial court may, on its own motion, dismiss prior strike conviction allegations in the furtherance of justice. (Id., at p. 530.)

The Romero decision is fully retroactive. Regarding the disposition of cases where Three Strikes sentences have been imposed, footnote 13 states the following:

> A defendant serving a sentence under the Three Strikes law imposed by a court that misunderstood the scope of its discretion to strike prior felony conviction allegations in furtherance of justice

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conviction. (C.T. 52; R. T. 3A.)

> pursuant to section 1385(a), may raise the issue on appeal, or, if relief on appeal is no longer available, may file a petition for habeas corpus to secure reconsideration of the sentence. (People v. Superior Court (Romero), supra, 13 Cal.4th at p. 530, fn. 13;Cal.4th' see mod. opn. 13 Cal.4th 1026a.)

In the instant case, on October 10, 1996, the court denied appellant's motion to strike his prior convictions. In denying appellant's motion, the court relied on appellant's past criminal record as the sole basis for denying appellant's motion. (R.T. 264-265.)

A review of the sentencing transcript clearly demonstrates the court did not properly exercise its discretion utilizing the three factors mandated by the California Supreme Court in People v. Superior Court (Romero), supra, 13 Cal.4th at p. 497. Romero expressly specified the circumstances to be considered by the sentencing court when receiving evidence and deciding whether or not to exercise discretion under Penal Code section 1385, subdivision (a). (People v. Superior Court (Romero), supra, 13 Cal.4th at pp. 530-531, citing with approval People v. Dent, (1995) 38 Cal.App.4th 1726, 1731.) The trial court may, on its own motion, dismiss prior felony convictions alleged as "strikes," in the furtherance of justice, after receiving and considering evidence relevant to **all** of the following:

> 1. **the circumstances of the commission of the current felony** ;
>
> 2. the nature of the offender including the offender's criminal history in its entirety and its recency, and, his or her personal traits, e.g., age, maturity, substance abuse, if any, family background/childhood; and



> 3. **then making an "individualized" determination based on the circumstances of the case and the offender before it**. (Id; [emphasis added].)

'""Furtherance of justice," requires consideration both of the constitutional rights of the defendant, and the *interests of society represented by* the People, in determining whether there should be a dismissal. [Citations.]' At the very least, the reason for dismissal must be 'that which would motivate a reasonable judge.' [Citations.]." People v. Superior Court (Romero), supra, 13 Cal.4th at pp. 530-531.)

In the instant case, the court only utilized the second criteria set forth in Romero; namely, appellant's criminal history. (People v. Superior Court (Romero), supra, 13 Cal.4th at pp. 530-531.) The court did not consider the first factor listed by Romero: the circumstances of the commission of the current felony offense. This factor was significant in this case because appellant possessed a rock of cocaine weighing .10 grams – hardly a usable amount. (R.T. 148.)

The court also did not consider the third factor listed by Romero: the making of an **"individualized"** determination based on the circumstances of the case and the offender before it. (People v. Superior Court (Romero), supra, 13 Cal.4th at pp. 530-531.) This factor was also significant because appellant's "strike" convictions occurred in "one swing" in 1982 when appellant was 21 years old. (C.T. 15, 154, 156.)

More importantly, the record does not *clearly* indicate that the trial court would not, in any event, exercise its informed discretion using the three express factors outlined by the Supreme Court in Romero. Rather, it relied *solely* on appellant's past criminal record. (R.T. 264-265.) The fact that the court only considered appellant's criminal history underscores the fact that the court did not comport with the discretionary requirements of Romero.

given the state of the record, it cannot be said with any certainty how the Superior Court would exercise its informed

discretion using the Romero criteria. A contrary opinion that this record **does** contain such a clear indication must necessarily be based on two assumptions: one, that the trial court exercised its discretion after hearing all of the available evidence in mitigation; and, two, that defense counsel presented all of the available evidence in mitigation. Neither of these two assumptions are supported by this record.

By ignoring the clear dictates of the Supreme Court in Romero, this Court would, in actuality, be "speculating" what the Superior Court would do. This is improper and is exactly why remand is appropriate. By analogy, it has been recognized that a vice in the complete failure by the trial court to state reasons for its sentencing choices is that any attempt to ascertain its effect calls for compound speculation and subjective assumptions about the trial court's mental processes. (See People v. Reiley (1987) 192 Cal.A00.3d 1487, 1491 [refusing to "speculate on the probability the court will impose the same sentence on remand"].) Here, without any indication of the trial court's intention in striking appellant's prior convictions using the three express factors listed in Romero, one can only speculate as to how it would rule.

In In re Cortez (1971) 6 Cal.3d 78, the California Supreme Court addressed the question of whether or not a court could properly summarily deny a petition for writ of habeas corpus asking the trial court to resentence him in light of the then-recent decision in People v. Tenorio (1970) 3 Cal.3d 89. In a thoughtful opinion, Justice Sullivan explained the tangible problems with surmising what a court would have decided based on the hypothesis that it received all of the information that would have been presented on the question. (Id., at pp. 85-89, specifying proper procedure; p. 86 fn. 8, cited in Romero at p. 516.)

> Retroactivity in this context implies an unraveling of time backwards until the original situati9n is exposed and an



> application of the prescribed ameliorative procedures to the reconstructed scene. Since obviously it is impossible to peel off the layers of past time like those of an onion, we are compelled to simulate and reconstruct the event as accurately as possible in the present and under inevitably changed circumstances. The event we must reconstruct in order to effect Tenorio relief is the opportunity for a convicted narcotics defendant to attempt to persuade the sentencing judge, now released from the restrictions of section 11718, to strike a prior convictic ', thereby reducing the prison term prescribed by law and, in some instances, making the defendant eligible for probation. (Ibid., at p. 85.)

More recently, in People v. Superior Court (Alvarez), supra, 14 Cal.4th 968, the California Supreme Court, in addressing the scope of Penal Code section 17, subdivision (b) discretion in Three Strikes cases, stated, "[S]ince all discretionary authority is contextual, those factors that direct similar sentencing decisions are relevant, including the 'nature and circumstances of the current offense, the defendant's appreciation of and attitude during the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.' [Citations.]" (Id., at p. 978.) The court also noted that "[T]o judicially mandate that a single factor predominate the trial court's exercise of discretion would eviscerate the essence of it's statutory authority; indeed, it would be one step shy of declaring the three strikes law eliminates the court's discretion entirely." (People v. Superior Court (Alvarez),

supra, 14 Cal.4th at p. 979.)[13/]

Similarly, in the instant case, the trial court, by relying solely on appellant's past "strikes" and not considering the minor nature of the present offense, and the fact that appellant's last "strike" offenses occurred in "one swing" in 1982, ignored the clear dictates of Romero, and did not properly exercise it's authority under section 1385. (People v. Superior Court (Alvarez), supra, 14 Cal.4th at p. 979.)

As Justice Sullivan spelled out in detail in Cortez, there are specific constitutional, procedural due process rights attendant to the pronouncement of judgment: "[It] . . . is a critical stage in the criminal prosecution when the

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13. Alvarez also stated that when appropriate, judges should consider the general objectives of sentencing set forth in California Rules of Court. (Id., at p. 479.) California Rules of Court, rule 410 states as follows:

> General objectives of sentencing include: [¶] (a) Protecting society. [¶] (b) Punishing the defendant. [¶] (c) Encouraging the defendant to lead a law abiding life in the future and deterring him from future offenses. {¶] (d) Deterring others from criminal conduct by demonstrating its consequences. [¶] (e) Preventing the defendant from committing new crimes by isolating him for the period of incarceration. [¶] (f) Securing restitution for the victims of crime. [¶ (g) Achieving uniformity in sentencing. [¶] Because in some instances these objective may suggest inconsistent dispositions, the sentencing judge shall consider which objectives are of primary importance in the particular case. [¶] The sentencing judge should be guided by statutory statements of policy, the criteria in these rules, and the facts and circumstances of the case.



constitutional rights to 'appear and defend, in person and with counsel' (Cal. Const., art. I, §13 [formerly, now §15]) apply . . . ." (In re Perez (1966)65 Cal.2d 224, 229 [parallel citation omitted].) A defendant convicted of a felony has the right to be present at the pronouncement of judgment (Pen. Code, §1193); to be represented by counsel (Mempa v. Rhay (1967) 389 U.S. 128 [19 L.Ed.2d 336, 88 S.Ct. 254]; In re Perez, supra, 65 Cal.2d 224); and to receive a hearing at which he may present evidence with respect to mitigation of sentence (Pen. Code § 1204.)" (In re Cortez, supra, 6 Cal.3d t p. 88.)

In order for Justice Sullivan's words to have any force or effect, appellant's sentencing hearing on October 10, 1996, must have been conducted in front of a judicial officer who heard that evidence with the open-mindedness, responsibility and accountability of a judge who actually KNEW and UNDERSTOOD the parameters of the trial court's discretion under Romero.

Where as here, a sentence was imposed without full application of discretionary sentencing choices, it violates the due process clause of the Fourteenth Amendment of the United States Constitution. "Defendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court." (People v. Belmontes (1983) 34 Cal.3d 335, 348, fn. 8,[14/] citing United v. Tucker (1972) 404 U.S. 443, 447 [30 L.Ed.2d 592, 596, 92 S.Ct. 589] [sentencing based upon prior, unconstitutional convictions violates due process]; see also, Hicks v. Oklahoma (1980) 447 U.S. 493 [65 L.Ed.2d 175, 100 S.Ct. 2227] [defendant has Fourteenth Amendment liberty interest protected by due process in state's sentencing procedures, where defendant had statutory right to be sentenced by jury]; Payton v. Whitley (5th Cir. 1991) 941 F.2d 1321, 1322 ["due process is violated when a sentencing judge or jury is unaware of discretionary

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14. In footnote 13, the Romero opinion cited Belmontes, footnote 8, for its full retroactivity holding.

sentencing alternatives"]; Terrebone v. Butler (5th Cir. 1988) 848 F.2d 500, 507, fn. 13 [erroneous imposition of "mandatory" life sentence in ignorance of discretionary alternatives may violate due process clause of Fourteenth Amendment].) "A court which is unaware of the scope of its discretionary powers is no more exercising that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." (People v. Belmontes, supra, 34 Cal.3d at p. 348, fn. 8, emphasis added.)

Appellant submits that this court should refrain from judging facts, in the abstract or otherwise, and from speculating, based an incomplete, deficient sentencing hearing, what a reasonable sentencing judge would do if he had made a decision only after considering all the circumstances in mitigation.

Based on the foregoing, in following Romero, appellant respectfully submits this case should be remanded to the trial court for resentencing, with directions to afford appellant a de novo hearing pursuant to Penal Code section 1204, at which appellant is personally present and represented by counsel; a new probation report should be prepared addressing the exercise o judicial discretion pursuant to Penal Code section 1385, subdivision (a), and the principles articulated and factors to be considered as identified by the Supreme Court in Romero; then, after duly considering that full and complete record, the trial court can reach its decision whether or not to exercise its discretion to strike one or both of the "strikes" against appellant to reduce his sentence to a reasonable period of time for the crime he currently committed, in light of his personal and criminal background, the circumstances of the present offense, and the real need, if any, for society to sequester him for the remainder of his natural life.



## CONCLUSION

Based on the foregoing, appellant respectfully submits that the judgment of conviction and sentence should be reversed. Alternatively, this matter must be remanded for resentencing.

DATE: May 2, 1997 Respectfully Submitted,

/ S /

SYLVIA KORYN

Attorney for Defendant-Appellant

STEVEN M. COLLINS

**PROOF OF SERVI CE BY MAIL**

I, DANIELLE MOLINEUX, declare as follows:

I am over eighteen (18) years of age and not a party to the within action. My business address is 1223 Broadway Street, Suite 101, Santa Monica, California 90404.

On May 2, 1997 I served the within

**APPELLANT'S OPENING BRIEF**

on each of the following, by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the United States Mail at Los Angeles, California addressed as follows:

Superior Court of California
Los Angeles County-Dept. SW "L"
825 Maple Street
Torrance, CA 90503
For Delivery to the Honorable
Andrew C. Kauffman, Judge

Daniel Lungren
State Attorney General
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North Tower, Suite 5001
Los Angeles, California 90013

Gil Garcetti
District Attorney
Gina Satriano
Deputy District Attorney
825 Maple Street
Torrance, CA 90503

Michael P. Judge
Public Defender
Mary Nachman
Deputy Public Defender
3655 Torrance Blvd., #200
Torrance, CA 90503

California Appellate Project



**LEGAL MAIL**
Steven M. Collins, #J-00781
Ironwood State Prison
A1-245L
P.O. Box 2199
Blythe, CA 92226

I deposited said envelopes in the mail at Santa Monica, California.

/ s /

DANIELLE MOLINEUX

# APPENDIX K

Former § 2254(d) provided:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right,

failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or;

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court



proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.